Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

THOMAS A. EAMES, ROBERTA L. EAMES
and TAMMY EAMES,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the heightened pleading standard under Federal Rule of Civil Procedure 9(b) apply to claims not enumerated therein?

2. Should Rule 9(b)'s heightened pleading standard be applied, as the Third Circuit applied it below (and the First Circuit likewise applies it), to claims that are provable on a showing of negligent misrepresentation? Or should it not apply to such claims, as the Fourth, Fifth, Seventh, Eighth and Ninth Circuits have held?

3. Should Rule 9(b)'s heightened pleading standard apply to state consumer protection statutes, where liability under those statutes can be triggered by a mere showing of negligence?

4. Can the Courts of Appeals properly impose separate pleading standards based on a plaintiff's status or identity, so that (as in the Third Circuit) investors in securities litigation need not plead negligent misrepresentation with particularity, while ordinary consumers must so plead?

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Petitioners Thomas A. Eames, Roberta L. Eames and Tammy Eames (collectively, the "Eames plaintiffs") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The district court's March 31, 2008 report and recommendation of United States Magistrate Judge is reproduced in the accompanying appendix at pages 18a-46a. The district court's September 30, 2008 memorandum opinion, adopting the Magistrate Judge's report and recommendation, appears at pages 8a-16a of the appendix. The Third Circuit's September 24, 2009 opinion is reproduced at pages 1a-7a of the appendix; and the Third Circuit's October 13, 2009 order denying rehearing *en banc* appears at pages 47a-48a of the appendix.

STATEMENT OF JURISDICTION

The opinion and judgment for which review is sought were issued by the Third Circuit on September 24, 2009. The Third Circuit's order denying rehearing *en banc* was issued on October 13, 2009. This petition is thus timely, having been filed within 90 days of the judgment below. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In this proposed class action, the Eames plaintiffs challenge Nationwide's misrepresentation of policy limits for Personal Injury Protection (or "PIP") coverage under the Delaware PIP statute, 21 *Del. C.* § 2118.[1] They contend that Nationwide has represented to thousands of Delaware insureds that they enjoy "full" PIP (or "full coverage" for PIP), when in fact Nationwide contends that they are entitled to just the minimum limits of liability required by the PIP statute. That statute, section 2118, provides in part:

> **§ 2118. Requirement of insurance for all motor vehicles required to be registered in this State; penalty.**
>
> (a) No owner of a motor vehicle required to be registered in this State, other than a self-insurer pursuant to § 2904 of this title, shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum insurance coverage:
>
> * * *
>
> (2)a. Compensation to injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident for:

---

1. PIP coverage is the first-party, no-fault insurance that covers medical expenses, lost wages and funeral expenses arising from covered auto accidents.

> 1. Medical, hospital, dental, surgical, medicine, x-ray, ambulance, prosthetic services, professional nursing and funeral services. Compensation for funeral services, including all customary charges and the cost of a burial plot for 1 person, shall not exceed the sum of $5,000. Compensation may include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.
>
> 2. Net amount of lost earnings. Lost earnings shall include net lost earnings of a self-employed person. ***

The Eames plaintiffs sued Nationwide under Delaware's Consumer Fraud Act, 6 *Del. C.* § 2511 *et seq.* (the "DCFA"). Section 2513 of the DCFA provides in part:

> **§ 2513. Unlawful practice.**
>
> (a) The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

Section 2525 of the DCFA reads in part as follows:

> **§ 2525. Private cause of action; savings clause for private claims against persons who acquired property by unlawful practices.**
>
> (a) A private cause of action shall be available to any victim of a violation of this subchapter. Such cause of action may be brought in any court of competent jurisdiction in this State without prior action by the Attorney General as provided for in this subchapter.

The district court and Third Circuit applied a heightened pleading standard to the Eames plaintiffs' DCFA claim under Federal Rule of Civil Procedure 9(b). Rule 9(b) provides:

> **Rule 9. Pleading Special Matters**
>
> * * *
>
> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND.
>
> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

STATEMENT OF THE CASE

This proposed class action was commenced in the Superior Court of the State of Delaware on August 20, 2004. On October 1, 2004, Nationwide removed the case from Superior Court to federal court.

Proceedings in the District Court

The Eames plaintiffs seek certification of a proposed class with respect to Nationwide's misrepresentation of policy limits for Personal Injury Protection coverage under 21 *Del. C.* § 2118. They contend that Nationwide has represented to thousands of Delaware insureds that they enjoy "full" PIP (or "full coverage" for PIP), when in fact Nationwide contends that they are entitled to just the minimum PIP limits required by statute.[2]

---

2. The same underwriting practice was condemned by a Georgia appellate court as "unbelievably deceptive" more than twenty years ago:

> *** I cannot help but opine that this form [employing Nationwide's "full PIP" usage], while admittedly barely complying with the new statute, is ***unbelievably deceptive*** in that the block wherein one may indicate his selection of only basic personal injury protection is captioned by the words: "FULL COVERAGE." Especially is this a less than adequate description in view of the fact that there is absolutely no coverage which may be purchased that is ***less*** than that which is designated as "FULL COVERAGE."

Hardy v. Nationwide Ins. Co., 356 S.E.2d 38, 39 (Ga. Ct. App. 1987) (Carley, J., concurring) (emphasis added in part).

A. The Initial Motion to Dismiss

Nationwide moved to dismiss the Eames' plaintiffs' original complaint on October 7, 2004. Ruling on the motion to dismiss, the predecessor trial judge dismissed a breach of contract count (on grounds not pertinent to this appeal), and also dismissed a separate count under Delaware's Consumer Fraud Act, 6 *Del. C.* § 2513, for lack of particularity. *Eames v. Nationwide Mut. Ins. Co.*, 412 F. Supp.2d 431, 435-38 (D. Del. 2006) ("*Eames* I"). The Eames plaintiffs had also pled a civil conspiracy claim; but because it was necessarily predicated on the consumer fraud claim, that count was likewise dismissed. *Id.* at 438-39. However, finding that the original complaint did "set forth a claim in skeletal form," the district court granted leave to the Eames plaintiffs to amend the consumer fraud count and (by extension) revive the civil conspiracy count. *Id.* at 438, 438-39.

B. The Amended Complaint

On February 10, 2006 the Eames plaintiffs filed and served their amended complaint. The amended complaint alleged that as a matter of general business practice, and acting through its authorized insurance agents, Nationwide routinely represents to consumers that they are purchasing "full" PIP, when in fact Nationwide contends that the thing sold is just minimum PIP. It further alleged that Nationwide routinely makes these representations through "rate quotes" and other policy-related documents. It also alleged that when Nationwide has occasion to pay PIP benefits to the affected claimants, "it treats their PIP limits as exhausted once the minimum statutory amount has been paid."

In addition, the amended complaint set forth several allegations specific to (but not unique to) the Eames plaintiffs. It alleged that they had been subjected by Nationwide to the offending practice. It alleged specific oral and written representations made to the Eames plaintiffs by Nationwide's insurance agent (whom the amended complaint identified by name), promising them "full" PIP. It further alleged that the earliest of these representations was made to the Eames plaintiffs in or about March 1994, when the Nationwide auto policy was first sold to them. It next alleged that, following a February 2003 auto collision in which all three plaintiffs sustained injuries (and thus became PIP claimants), Nationwide made additional written representations characterizing their PIP coverage as "full." Finally, the amended complaint alleged that by letter to the Eames's attorney dated June 13, 2003, Nationwide took the position that Mr. Eames's PIP coverage had been exhausted by virtue of Nationwide's payment of the minimum limit.

So that the Court may better appreciate the amended complaint's level of detail, we reproduce the following allegations from paragraph 13 of the complaint:

> 13. In connection with their claims for PIP benefits, the proposed class representatives have been subjected by Nationwide to the practices complained of above, including the practices alleged in paragraphs 9 and 10 above. Specifically, Nationwide has represented to one or more of the proposed class representatives that the subject policy

provides "full" limits of liability for PIP coverage; and it has thereafter taken the position that such limits have been exhausted by payment of the minimum statutory amount:

a. In approximately March 1994 Nationwide, acting through its agent Culver Insurance Agency of Seaford, Delaware (now known as Muncie Insurance & Financial Services, Inc.), sold the subject policy to Mr. and Mrs. Eames. On or about March 14, 1994, and in connection with that sale, the Culver agency (acting for Nationwide) represented that the policy would provide "full" limits of liability for PIP coverage.

b. On information and belief, the document attached as Exhibit A (or one or more documents substantially identical to it) was shown to Mr. or Mrs. Eames, or both, by a representative of the Culver agency, and at the time the policy was purchased in March 1994.

c. On information and belief, one or more representatives of the Culver agency represented orally to Mr. or Mrs. Eames (or both) that the subject policy would provide "full" limits of liability for PIP coverage. These representations were made on behalf of Nationwide, and at the time the policy was sold to Mr. and Mrs. Eames in or about March 1994.

> d. On information and belief, the offending representations were made by Culver employees Keith Culver, Linda Sanders or both. They may also have been made by other representatives of the Culver agency.
>
> * * *
>
> f. On or about June 13, 2003 (and in the aftermath of the February 7, 2003 collision) Nationwide advised Mr. Eames by letter that he had "exhausted his/her benefits under the PIP/NO FAULT portion of this insurance policy" (meaning the policy issued by Nationwide to Mr. and Mrs. Eames). A copy of this letter is attached as Exhibit D.
>
> g. Despite its repeated representations to the contrary, Nationwide contends that Mr. and Mrs. Eames's policy provides only the minimum statutory PIP limits (of $15,000 per person and $30,000 per accident).

C. The August 29, 2006 Memorandum Opinion

On February 27, 2006, Nationwide moved to dismiss the amended complaint. The district court addressed that motion in its August 29, 2006 Memorandum Opinion. *See Eames v. Nationwide Mut. Ins. Co.*, C.A. No. 04-1324KAJ, 2006 WL 2506640 (D. Del. Aug. 29, 2006) ("*Eames* II"). This opinion demonstrated that the amended complaint's allegations were sufficiently "particular" to apprise the predecessor judge, at least, of the nature of the alleged misconduct and the subject

matter of the lawsuit. The predecessor judge was thus readily able to grasp, and summarize, the amended complaint's allegations:

> According to the Plaintiffs, Nationwide misrepresented the liability limits for PIP coverage by using the term "full" to refer to PIP policies that only provided for the statutory minimum of $15,000 per person and $30,000 per accident. Plaintiffs contended that the use of "full" was a misrepresentation in two respects. First, Plaintiffs argued that "full" referred to the maximum amount of PIP coverage Nationwide offered, which was $100,000 per person and $300,000 per accident. "Thus, according to Plaintiffs, consumers are led to believe that they have purchased coverage with those maximum limits, and so the insurance policies must be interpreted to provide for those limits." Second, Plaintiffs argued that the use of the term "full" misleads consumers into believing "that they have purchased the fullest PIP limits or PIP coverage available; the purpose being to discourage them from seeking to purchase additional (and relatively inexpensive) PIP limits."

Eames II, slip op. at *1 (quoting *Eames* I, 412 F. Supp.2d at 433).

D. The Dismissal of the "Maximum Limit" Theory

As the quoted matter from the August 29, 2006 Memorandum Opinion (*Eames* II) shows, the predecessor judge correctly read the amended complaint to state two alternative theories of recovery under the DCFA. Under the first theory — what we may refer to as the "maximum limit" theory — the Eames plaintiffs contend that Nationwide's "full PIP" usage is false because it tends to suggest to the consumer that he has purchased maximum limits of $100,000 per person and $300,000 per accident (these being the fullest PIP limits Nationwide sells in Delaware). Under the second theory (the "fullest available limits" theory), the Eames plaintiffs contend that the "full PIP" scheme leads consumers to believe that limits of $15,000 per person and $30,000 per accident are "full" limits, when in fact they are minimum limits.

As part of his August 2006 ruling, the predecessor judge dismissed the Eames plaintiffs' first theory (the "maximum limit" theory) as time-barred under the applicable three-year statute of limitations. *Eames* II, slip op. at *4. Other issues raised by Nationwide's motion to dismiss were reserved for later decision.

E. The Referral to the Magistrate Judge

Following the August 2006 ruling, the predecessor judge was elevated to the Third Circuit bench. With the lawsuit temporarily unassigned to any district court judge, the balance of Nationwide's motion to dismiss the amended complaint was referred to a United State Magistrate Judge. Also referred to the Magistrate Judge was the Eames plaintiffs' motion for reconsideration of the August 29, 2006 Memorandum Opinion.

F. The Magistrate Judge's Report and Recommendation

On March 31, 2008 the Magistrate Judge recommended that the Eames plaintiffs' motion for reconsideration (with respect to the limitations issue) be denied, and that Nationwide's motion to dismiss the amended complaint be granted. In reaching these recommendations, the Magistrate Judge stated:

> Because Rule 9(b) applies to claims arising under DCFA . . . Plaintiffs must plead such misrepresentation or omission with particularity. In my view, Plaintiffs have failed to do so.

39a.

G. The September 30, 2008 Memorandum Opinion

On September 30, 2008 the successor judge adopted the Magistrate Judge's Report and Recommendation, holding that "Plaintiffs failed to plead their fullest available limit theory claims with the required particularity." 16a. Because the Eames plaintiffs' claims of civil conspiracy were derivative of and predicated on the statutory misrepresentation claims, the successor judge dismissed those claims as well. *Id.* The effect was to dismiss the case in its entirety.

Proceedings in the Third Circuit

On appeal to the Third Circuit, the district court's judgment was affirmed. The Third Circuit adopted the reasoning of the decisions below, including the district court's application of Rule 9(b) to DCFA claims. 6a. On October 13, 2009, the Third Circuit denied the Eames plaintiffs' petition for rehearing en banc. 47a-48a.

REASONS FOR GRANTING THE PETITION

The Federal Rules of Civil Procedure are meant to be applied in a uniform and consistent way throughout the federal court system. *See McMasters v. United States*, 260 F.3d 814, 819 (7th Cir. 2001), *cert. denied*, 535 U.S. 1112 (2002) (observing that "the Federal Rules of Civil Procedure are not intended to be geographically non-uniform.") *See also* Fed. R. Civ. P. 1 (providing that federal rules "govern the procedure in all civil actions and proceedings in the United States district courts[.]") Yet for a particular category of claims — those provable on a showing of negligent misrepresentation — uniformity is lacking.

The problem presents itself in two ways. ***First***, and as shown by the result below, the Third Circuit requires that statutory consumer fraud claims be pled with particularity. The Third Circuit imposes this requirement even where (as here) the statutory claim is provable on a showing of mere negligence. The DCFA, for example, does not incorporate the elements of common law fraud; and no proof of scienter, intent to induce reliance or justifiable reliance is required under the act. *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Instead, "the definition of unlawful practices [under the

DCFA] incorporates the principle that a negligent misrepresentation is sufficient to violate the statute." *Id.* By adopting the district court's holding below, however, the Third Circuit imposed Rule 9(b)'s heightened pleading standard on the Eames plaintiffs' DCFA claim.[3]

District courts within the Third Circuit follow suit. For example, the operative language from New Jersey's consumer fraud statute (the "NJCFA") is virtually identical to that of the DCFA, so that negligent misrepresentation is sufficient to impose liability thereunder.[4] The District of New Jersey nonetheless requires that NJCFA claims

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3. Rule 9(b) of the Delaware Court of Chancery's procedural rules is identical to the federal rule. *See* Del. Ch. Ct. R. 9(b). Notwithstanding, that court has held that the DCFA is not subject to any heightened standard of pleading. *State v. Publishers Clearing House*, 787 A.2d 111, 114-17 (Del. Ch. 2001).

4. The NJCFA prohibits

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate . . . whether or not any person has in fact been mislead (*sic*), deceived or damaged thereby . . . .

N.J. Stat. Ann. § 56:8-2. New Jersey's pattern jury instructions make clear that scienter is not a necessary element under the statute's opening clause, and that negligent misrepresentations or omissions are actionable under the statute. *See http://www.judiciary.state.nj.us* /civil/charges/4.43.doc (last visited December 22, 2009).

be pled with particularity. *Ramirez v. STI Prepaid LLC*, 644 F. Supp2d 496, 502 (D.N.J. 2009) ("Because Plaintiffs' primary claim is brought under the NJCFA, the Complaint must meet the requirements of Fed. R. Civ. P. 9(b)"); *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F. Supp.2d 494, 509-11 (D.N.J. 2000) (same). *See also Johnson v. GEICO Cas. Co.*, 516 F. Supp.2d 351, 359 (D. Del. 2007) (applying Rule 9(b) to DCFA).

Yet the Third Circuit's imposition of the particularity requirement in this case conflicts with decisions from other Courts of Appeal. Those courts apply Rule 9(b) only if the underlying claim requires proof of actual fraud. *See Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007), *cert. denied*, 552 U.S. 824 (2007) (claim for negligent misrepresentation "is *not* governed by the heightened pleading standard of Rule 9(b)") (emphasis in original); *Baltimore County v. CIGNA Healthcare*, No. 06-1877, 2007 WL 1655461, slip op. at *6 (4th Cir. June 5, 2007) (holding that "a claim of negligent misrepresentation under Maryland law does not contain an essential showing of fraud and thus the heightened pleading standard requirements of Rule 9(b) do not apply"); *American Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, No. 03-10179, 2004 WL 2297150, slip op. at *4 (5th Cir. Oct. 13, 2004) (because "Rule 9(b)'s stringent pleading standards should not be extended to causes of action not enumerated therein," negligent misrepresentation claims "are only subject to the liberal pleading requirements of Rule 8(a) . . ."); *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1104-05 (9th Cir. 2003) ("Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a)"); *In re Nationsmart Corp. Sec. Litig.*, 130 F.3d 309, 314 (8th Cir. 1997), *cert. denied*, 524

U.S. 927 (1998) (Rule 9(b) does not apply to claims under section 11 of the Securities Act of 1933, "because fraud or mistake is not a prerequisite to establishing liability under § 11.") *But see North American Catholic Educ. Found., Inc. v. Cardinale*, 567 F.3d 8, 15 (1st Cir. 2009) (though "one might think that negligent misrepresentation and fiduciary duty were not on their face subject to Rule 9(b) . . . the case law here and in other circuits reads Rule 9(b) expansively to cover associated claims where the core allegations effectively charge fraud.")

The Eames plaintiffs' statutory misrepresentation claim was thus held to a heightened standard of pleading because it was filed in the Third Circuit. Had it been filed in the Fourth, Fifth, Seventh, Eighth or Ninth Circuits, no heightened standard would have applied, and the case would not have been dismissed.

Second, the result below creates a procedural dichotomy within the Third Circuit itself. That is, where a plaintiff pleads misrepresentations arising from the sale of securities, the Third Circuit imposes no heightened pleading standard. *See In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 270 (3d Cir. 2006) ("Where a plaintiff's Section 11 or Section 12(a)(2) claims [under the Securities Act] are not grounded in allegations of fraud, the liberal notice pleading requirements of Rule 8 apply"); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 717 n.20 (3d Cir. 1996) (district court erred by applying Rule 9(b) to section 12(2) securities claim that was provable on a showing of negligence) (citations omitted). Were the Eames plaintiffs aggrieved investors rather than aggrieved insureds, their claims of statutory misrepresentation would have been judged under a different pleading standard.

In short, pleading state law claims for either statutory misrepresentation or negligent misrepresentation is a highly uncertain venture in the federal courts. *Cf Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 188 (2d Cir. 2004) (observing that "Rule 9(b) may or may not apply to a state law claim for negligent misrepresentation.") The applicability of Rule 9(b) to such claims should be settled, and can only be finally settled, in this Court. The conflicting approaches taken by the various Circuit Courts should be made uniform, so that the viability of a plaintiff's pleading no longer turns on where the plaintiff files, or whether the dispute is a securities or insurance case.

CONCLUSION

For the reasons stated above, the Eames plaintiffs respectfully request that writ of certiorari be allowed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 24, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4125

THOMAS A. EAMES, ROBERTA L. EAMES, and TAMMY EAMES, on behalf of themselves and all others similarly situated,

Appellants

v.

NATIONWIDE MUTUAL INSURANCE COMPANY.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 04-cv-01324)
District Judge: Honorable Joseph J. Farnan, Jr.

Submitted Under Third Circuit L.A.R. 34.1(a)
September 17, 2009

Before SLOVITER, FUENTES, and SMITH,
Circuit Judges.

(Opinion Filed: September 24, 2009)

Appendix A

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

The gravamen of the case filed by Thomas Eames, Roberta Eames, and Tammy Eames ("the Eameses") is that Nationwide Mutual Insurance Company ("Nationwide") engaged in misrepresentation with respect to the Eameses' automobile insurance policy by describing the policy limits for Personal Injury Protection ("PIP") coverage as "full." Specifically, the Eameses allege that this practice is misleading as they purchased "full" PIP coverage but only received the statutory minimum payments of $15,000 per person and $30,000 per accident when they made PIP claims on their Nationwide policy. The Eameses appeal from the District Court's Orders granting Nationwide's motions to dismiss. They challenge the District Court's statute-of-limitations ruling and its holding that the pleadings failed to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b). For the reasons stated below, we will affirm.

I.

The District Court had diversity jurisdiction under 28 U.S.C. § 1332. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the grant of Nationwide's motions to dismiss. *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 519 (3d Cir. 2007).

Appendix A

II.

Because we write primarily for the parties, we only discuss the facts and proceedings to the extent necessary for the resolution of the case.

The Eameses commenced this proposed class action in Delaware Superior Court; it was removed by Nationwide to the District Court of Delaware based on diversity jurisdiction. The case concerns Nationwide's sale of automobile insurance policies that describe the policy limits for Personal Injury Protection ("PIP") coverage as "full." Thomas Eames and Roberta Eames are named insureds under such a Nationwide automobile insurance policy. On February 7, 2003, they and their daughter, Tammy Eames, were injured in an automobile accident. The Eameses allege that they tendered claims for PIP benefits following the accident and that Nationwide stated that their policy limits had been exhausted by payment of the minimum statutory amount, $15,000 per person and $30,000 per accident.

The Eameses' original Complaint asserted five causes of action: (1) declaratory judgment; (2) breach of contract; (3) bad faith breach of contract; (4) consumer fraud in violation of the Delaware Consumer Fraud Act ("DCFA"), 6 Del.Code § 2513; and (5) civil conspiracy. With respect to the DCFA claim, the Eameses contend that the use of the word "full" deceptively suggested that they had purchased the maximum amount of PIP coverage that Nationwide actually offered, $100,000 per person and $300,000 per accident—the "maximum

limit" theory. The Eameses also argue that the word "full" misled them to believe that what they had purchased—$15,000 per person and $30,000 per accident—was the most PIP coverage available for purchase—the "fullest available limit" theory. The civil conspiracy cause of action was also premised on the allegation that Nationwide's characterization of PIP limits as "full" was misleading.

Nationwide filed a motion to dismiss the Eameses' Complaint. On February 2, 2006, the District Court dismissed the first three counts with prejudice. The Court dismissed the fraud-based claims with leave to amend, ruling that they were not pleaded with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b). The Eameses subsequently filed an Amended Complaint limited to claims for violation of the DCFA and civil conspiracy; Nationwide filed a second motion to dismiss. On August 29, 2006, ruling that the Eameses had reason to know in 1994 that their policy limits were $15,000 per person and $30,000 per accident, the District Court concluded that, with respect to the "maximum limit" theory, the applicable three-year statute of limitations had run. The Court dismissed the remaining counts to the extent that they relied on the "maximum limit" theory. Concerned about the effect of this partial dismissal on the amount in controversy, the Court reserved ruling on the balance of Nationwide's motion to dismiss pending a resolution of the jurisdictional question. The Eameses filed a motion to reconsider the statute-of-limitations ruling. In their jurisdictional submissions, the parties agreed that the amount-in-

controversy requirement was met even after the dismissal of the "maximum limit" theory.

The motion to dismiss and motion for reconsideration were referred to a Magistrate Judge who, in a Report and Recommendation, recommended that the motion for reconsideration be denied and that the motion to dismiss be granted. On September 30, 2008, the District Court issued a Memorandum Opinion overruling the Eameses' objections and granting the remainder of Nationwide's motion to dismiss.

In their Notice of Appeal, the Eameses appealed from the following orders: the February 2, 2006 Memorandum Opinion and Order granting Nationwide's motion to dismiss the original Complaint; the August 29, 2006 Memorandum Opinion and Order granting in part Nationwide's motion to dismiss the Amended Complaint based on statute-of-limitations grounds; and the September 30, 2008 Memorandum Opinion and Order adopting the Report and Recommendation and granting the remainder of Nationwide's motion to dismiss the Amended Complaint.

III.

On appeal, the Eameses raise the following contentions: (1) the requirement that a plaintiff plead fraud claims with particularity does not apply to statutory consumer protection claims; (2) assuming *arguendo* that the particularity requirement does apply, the Amended Complaint pled violations of the DCFA

with the requisite particularity; (3) the District Court erred in dismissing, on statute-of-limitations grounds, the fraud claims to the extent that they were based on the "maximum limit" theory; and (4) the Magistrate Judge improperly ruled on the merits of the Eameses' claims.

In three extensive written opinions, the District Court carefully and thoroughly considered the contentions that the parties raise in this appeal. After a complete review of the record and the parties' arguments, we find no basis for disturbing the District Court's rulings. Therefore, we will affirm the judgments substantially for the reasons set forth by the District Court in its written opinions. *See Eames v. Nationwide Mutual Ins. Co.*, No. 04-cv-1324, 2008 WL 4455743 (D. Del. Sept. 30, 2008); *Eames v. Nationwide Mutual Ins. Co.*, No. 04-cv-1324, 2006 WL 2506640 (D. Del. Aug. 29, 2006); *Eames v. Nationwide Mutual Ins. Co.*, 412 F.Supp.2d 431 (D. Del. 2006).

We add only the following: With respect to the statute-of-limitations ruling, the Eameses argue that Nationwide made representations in 2003 that they had "full" PIP coverage, thus beginning a new three-year limitations period. In 2003, however, the Eameses already had reason to know that the term "full," when applied to PIP coverage, did not mean the maximum amount of PIP coverage offered by Nationwide, $100,000 per person and $300,000 per accident. Thus, when Nationwide used the term "full" in 2003, this was not a misrepresentation that could commence a new

limitations period under the "maximum limit" theory. The Eameses' reliance on the 2003 statements is misplaced, and we will therefore affirm the District Court's statute of limitations ruling.

IV.

For the foregoing reasons, we affirm the judgments of the District Court.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FILED SEPTEMBER 30, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 04-1324-JJF-LPS

THOMAS A. EAMES, ROBERTA L. EAMES, AND TAMMY EAMES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION

Farnan, District Judge.

Pending before the Court are Plaintiffs' Objections to Magistrate Judge Leonard P. Stark's Report And Recommendations (D.I.248), which was issued on March 31, 2008 (D.I.247). Plaintiffs object to the Magistrate Judge's recommendation that Defendant's Motion to Dismiss (D.I.167) be granted, but do not object to the Magistrate Judge's recommendation that their Motion

for Reconsideration (D.I.218) be denied. For the reasons discussed, the Court will adopt the Magistrate Judge's Report and Recommendations.

I. Background.

On August 20, 2004, the proposed class representatives, Thomas, Roberta, and Tammy Eames ("Plaintiffs") filed this action against Defendant Nationwide Insurance Company ("Nationwide") alleging that Nationwide misrepresented to Plaintiffs the limits of liability for Personal Injury Protection ("PIP") coverage in policies that Nationwide sold by referring to the statutory minimum coverage levels as "full" PIP coverage.[1] (D.I. 1, "Original Complaint"). This action was originally filed in the Delaware Superior Court on August 20, 2004, and removed to this Court on October 1, 2004. (*Id.*)

In their Original Complaint, Plaintiffs asserted claims for breach of contract; bad faith breach of contract; declaratory judgment that class members are entitled to $100,000/$300,000 PIP coverage; violation of the Delaware Consumer Fraud Act ("consumer fraud claim"), 6 Del. C. § 2513; and civil conspiracy. (*Id.*) By Memorandum Opinion and Order dated February 2, 2006, Judge Jordan granted Nationwide's Motion To

1. Delaware motor vehicle owners must carry PIP insurance of at least "15,000 for any 1 person and $30,000 for all persons injured in any 1 accident." 21 Del. C. § 2118(a)(2)(b). This statutory minimum level of coverage is commonly referred to as "$15,000/$30,000."

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Dismiss concluding that: (1) Plaintiffs failed to state a claim for breach of contract, bad faith breach of contract and declaratory judgment, and (2) Plaintiffs failed to plead their claims for consumer fraud and civil conspiracy with particularity as required by Fed. R. Civ. P. 9(b). Judge Jordan also granted Plaintiffs leave to amend the fraud and civil conspiracy claims. (D.I.15.)

By their Amended Complaint (D.I.158), Plaintiffs reassert their claims for consumer fraud and civil conspiracy and base those claims on two theories, the maximum limit theory and the fullest available limit theory. With regard to the maximum limit theory, Plaintiffs contend that Nationwide falsely represents to customers that when they purchase "full" PIP coverage, they have purchased $100,000/$300,000 PIP coverage instead of the $15,000/$30,000 limits that "full" PIP actually covers. (D.I. 158 at ¶ 8). With regard to the fullest available limit theory, Plaintiffs contend that despite the actual availability of additional PIP ("APIP") in excess of statutory minimums, Nationwide's use of the term "full PIP" represents to consumers purchasing full PIP that they have purchased the highest amount of coverage available to a policy holder, a claim independent of the dollar amount of the coverage actually purchased. (*Id.* at ¶ 10.) In addition, the Amended Complaint explains in more detail than the Original Complaint, the circumstances in which each of the Plaintiffs were told that they purchased policies with "full" PIP coverage, but were later informed that the policies provided only the statutorily required $15,000/$30,000 PIP limits. (*Id.* at ¶ 13a-g.)

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In response to the Amended Complaint, Nationwide filed a second Motion to Dismiss. Specifically, Nationwide argued that: 1) Plaintiffs failed to plead fraud with particularity; 2) Plaintiffs failed to plead harm; (3) Plaintiffs' claims are barred by the statute of limitations; 4) Plaintiffs failed to state a claim for civil conspiracy; and 5) Plaintiff Tammy Eames has no standing. (D.I.167).

By decision dated August 29, 2006, Judge Jordan granted in part Nationwide's Motion To Dismiss. Judge Jordan concluded that Plaintiff's consumer fraud and conspiracy claims based on the "maximum limit theory" were time-barred. However, Judge Jordan reserved judgment on the remaining claims pertaining to the "fullest available limit" theory, because (1) further development of the record was needed to show whether Plaintiff's claims were time-barred, and (2) the partial dismissal raised a question concerning whether subject matter still existed over the remaining claims based on the amount in controversy. Judge Jordan ordered further briefing on the question of subject matter jurisdiction. (D .I. 216, 217. Shortly thereafter, Plaintiffs filed a Motion for Reconsideration of Judge Jordan's ruling that claims under the maximum limit theory were time-barred. (D.I.218.)

On December 15, 2006, Judge Jordan was elevated to the United States Court of Appeals for the Third Circuit, and this case was initially reassigned to the judicial vacancy. (D.I.232.) It was subsequently referred to Magistrate Judge Mary Pat Thynge and then to

Magistrate Judge Leonard P. Stark. (D.I.232, 236.) After Magistrate Judge Stark heard oral arguments on January 18, 2008 (D.I.243), the case was reassigned to this Court on February 1, 2008. Because of Magistrate Judge Stark's familiarity with the case, the Court referred the case back to Magistrate Judge Stark on February 18, 2008, for all proceedings up to and including the pretrial conference. (D.I.246.)

On March 31, 2008, Magistrate Judge Stark issued his Report And Recommendations Regarding Plaintiffs' Motion For Reconsideration And Defendant's Motion To Dismiss, And Order Regarding Defendant's Motion To Strike. (D.I.247.) Magistrate Judge Stark recommended the denial of Plaintiffs' Motion For Reconsideration on the grounds that Plaintiffs "failed to meet the stringent standards" necessary to warrant reconsideration of Judge Jordan's decision that Plaintiffs' claims pursuant to the "maximum limit theory" were time-barred. (D.I. 247 at 11.). Magistrate Judge Stark also considered those portions of Nationwide's Motion To Dismiss which remained outstanding after Judge Jordan's August 29, 2006 decision, and recommended that Nationwide's Motion To Dismiss be granted. In addition, Magistrate Judge Stark resolved Nationwide's Motion To Strike concluding that it was moot.

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II. STANDARD OF REVIEW

When objections are filed to a magistrate judge's report and recommendation, the court reviews *de novo* the parts of the magistrate judge's disposition which are subject to the objections. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C) (2008). The court may accept, reject, or modify the magistrate judge's recommendations. The court may also receive further evidence or return the matter to the magistrate judge with instructions for proceeding. *Id.*

III. DISCUSSION

Plaintiffs' primary objection to the Report and Recommendation is that, despite Judge Jordan's prior determination that Plaintiffs alleged misrepresentation sufficient to withstand dismissal under Rule 12(b)(6), the Magistrate Judge improperly revisited this subject, even though it was not briefed anew in Nationwide's second Motion To Dismiss. Plaintiffs further contends that the merits of their fraud claim should have been left to a jury.

Nationwide contends that the Magistrate Judge's decision is not inconsistent with prior rulings by Judge Jordan in the case, because the Magistrate Judge's dismissal is framed in the context of Rule 9(b). Stated another way, Nationwide contends that "the Report and Recommendation did not dismiss the statutory fraud count simply because there was no misrepresentation alleged. Rather, there was simply no misrepresentation

alleged **with sufficient particularity.**" (D.I. 251 at 9) (emphasis in original).

In pertinent part, Fed.R.Civ.P. 9(b) provides that a party alleging fraud "must state with particularity the circumstances constituting fraud. . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The circumstances of the alleged fraud must be plead with sufficient particularity "to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Seville Industrial Machinery Corp. V. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir.1984).

These heightened pleading requirements apply to claims arising under the Delaware Consumer Fraud Act. *See Johnson v. Geico Cas. Co.*, 516 F. Supp. 2d 351, 359 (D. Del. 2007). In order to state a claim under the Delaware Consumer Fraud Act, a plaintiff must, at a minimum, allege with the required particularity that the defendant negligently omitted or concealed a material fact, and that the defendant "intended that others rely on the omission or concealment." *Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

In addition, claims of civil conspiracy are not independent causes of action. Rather, these claims must be predicated on an underlying wrong. *Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 42, 72 (D. Del. 2002).

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Reviewing *de novo* the decision of Magistrate Judge Stark, the Court concludes that Magistrate Judge Stark did not err in his determination that Plaintiffs failed to plead their claims with the specificity required by Rule 9(b). Although the Magistrate Judge's Report and Recommendations can be read as holding that Plaintiffs failed to plead a misrepresentation in the first instance, it appears to the Court that the Magistrate Judge's determination that there was no actionable misrepresentation was also made within the context and requirements of Rule 9(b). For example, the Magistrate Judge recognized that Plaintiff was required to plead "at least a negligent misrepresentation or omission of material fact by Nationwide with the intent that Plaintiffs rely on such misrepresentation or omission," and went on to state:

> Because Rule 9(b) applies to claims arising under [the Delaware Consumer Fraud Act] . . . Plaintiffs must plead such misrepresentation or omission with particularity. *In my view, Plaintiffs have failed to do so.*

(D.I. 247 at 16) (emphasis added).

In any event, the Magistrate Judge clearly invoked Rule 9(b) as, at least an alternate ground, to support his recommendation of dismissal, and reviewing the allegations of the Amended Complaint *de novo* in the context of the requirements of Rule 9(b), the Court agrees with and adopts the Magistrate Judge's reasons

for concluding that Plaintiffs failed to plead their fullest available limit theory claims with the required particularity. (*Id.* at 4, 19, 20). In addition, the Court agrees with Judge Stark's determination that Plaintiffs should not be permitted a third opportunity to satisfy the requirements of Rule 9(b) where, as here, Plaintiffs are represented by counsel and Nationwide has already had to defend itself against two complaints.

As for Plaintiff's other objections, the Court likewise concludes that the Magistrate Judge's decision was not erroneous. Accordingly, the Court agrees with and adopts the Magistrate Judge's Report and Recommendations that Plaintiffs consumer fraud and civil conspiracy claims be dismissed.

IV. CONCLUSION

For the reasons discussed, the Court will adopt Magistrate Judge Stark's Report and Recommendation.

An appropriate Order will be entered.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 04-1324-JJF-LPS

THOMAS A. EAMES, ROBERTA L. EAMES, AND TAMMY EAMES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

ORDER

At Wilmington, this 30th day of September 2008, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiffs' Objections to Magistrate Judge Leonard P. Stark's Report and Recommendation (D.I.248) dated March 31, 2008 (D.I.247), are **OVERRULED.**

2. Magistrate Judge Stark's Report and Recommendation (D.I.247) is **ADOPTED.**

s/ Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DEFENDANT'S MOTION TO DISMISS, AND ORDER REGARDING DEFENDANT'S MOTION TO STRIKE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FILED MARCH 31, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civ. No. 04-1324-JJF-LPS

THOMAS A. EAMES, ROBERTA L. EAMES, AND TAMMY EAMES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DEFENDANT'S MOTION TO DISMISS, AND ORDER REGARDING DEFENDANT'S MOTION TO STRIKE

This is a proposed class action involving automobile insurance contracts. The proposed class representatives, Thomas, Roberta, and Tammy Eames

(collectively "Plaintiffs") allege that Defendant Nationwide Mutual Insurance Company ("Nationwide") misrepresented to class members the limits of liability for Personal Injury Protection ("PIP") coverage included in Nationwide auto insurance policies. *See* Amended Complaint (Docket Item ("D.I.") 158).

Pending before me are three motions: (i) Plaintiffs' motion to reconsider Judge Jordan's August 29, 2006 order dismissing a portion of the Amended Complaint (D.I. 218 and, hereinafter, "Motion for Reconsideration"); (ii) Defendant's motion to strike Plaintiffs' reply brief and letter filed in support of their Motion for Reconsideration (D.I. 225 and, hereinafter, "Motion to Strike"); and (iii) Defendant's motion to dismiss the remaining portions of the Amended Complaint (D.I. 167 and, hereinafter, "Motion to Dismiss").

For the reasons that follow, I recommend that Plaintiffs' Motion for Reconsideration be denied and Nationwide's Motion to Dismiss be granted. Further, I dismiss Nationwide's Motion to Strike as moot.[1]

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1. This matter was referred to the undersigned magistrate judge by orders dated December 3, 2007 (D.I.236) and February 14, 2008 (D.I.246). Pursuant to these referral orders, as well as 28 U.S.C. § 636, my authority with respect to the case-dispositive Motions to Reconsider and to Dismiss is limited to issuing a Report and Recommendation. With respect to the Motion to Strike, my ruling is an order of the Court.

Appendix C

I. BACKGROUND[2]

A. *Judge Jordan's February 2006 Opinion*

Plaintiffs initially filed their complaint in Delaware Superior Court on August 20, 2004. (D.I. 1 ("Original Complaint")) Nationwide removed the case to District Court on October 1, 2004. *Id.*

Both the Original Complaint and the Amended Complaint arise from Nationwide's underwriting of PIP insurance coverage. PIP coverage provides "[c]ompensation to injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident." 21 Del. C. § 2118(a)(2)(a). Delaware law mandates that all motor vehicle owners carry PIP insurance of at least "$15,000 for any 1 person and $30,000 for all persons injured in any 1 accident." *Id.* at § 2118(a)(2)(b). This amount is referred to colloquially as "$15,000/$30,000."

Plaintiffs alleged that Nationwide misrepresented the limits of liability of their PIP coverage by describing $15,000/$30,000 PIP coverage-the statutory minimum-as "full" PIP. (D.I. 1 ¶ 9) Plaintiffs further alleged that when they suffered an automobile accident in February 2003, Nationwide should not have limited its PIP payments to $15,000/$30,000.

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2. The factual portions of the following background information are based on Plaintiffs' allegations, which are assumed to be true for purposes of reviewing Nationwide's Motion to Dismiss.

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The Original Complaint asserted five claims: (i) a claim seeking a declaratory judgment that class members were entitled to maximum PIP limits of $100,000 per person and $300,000 per accident ("$100,000/$300,000"); (ii) breach of contract; (iii) bad faith breach of contract; (iv) a violation of the Delaware Consumer Fraud Act ("DCFA"), 6 Del. C. § 2513; and (v) civil conspiracy. (D.I.1) Judge Jordan granted Nationwide's motion to dismiss each of these claims. *See Eames v. Nationwide Mut. Ins. Co.*, 412 F.Supp.2d 431 (D.Del.2006) ("February Opinion"). Specifically, Judge Jordan dismissed the declaratory judgment and contract claims with prejudice, based on his conclusion that "the insurance contract unambiguously provides for the $15,000/ $30,000 limit, even assuming that Nationwide distributed documents using the word 'full' to describe those limits." *Id.* at 435. Finding that the Original Complaint failed to plead fraud with the particularity necessary to satisfy Rule 9(b), but did "set forth a claim in skeletal form," Judge Jordan dismissed the DCFA and conspiracy claims without prejudice and granted leave to amend. *Id.* at 438-39.

B. *Plaintiffs' Amended Complaint*

Plaintiffs filed their Amended Complaint on February 10,2006. (D .I. 158) Consistent with the February Opinion, it asserts only the DCFA and civil conspiracy claims. The Amended Complaint repeats Plaintiffs' central allegation that Nationwide uses the term "full" to describe what is actually the statutory minimum amount of PIP coverage: $15,000/$30,000.

In this way, Plaintiffs contend, Nationwide leads consumers to believe that when they purchase "full" PIP they have purchased the most PIP coverage available. This, they continue, is untrue, because at all relevant times Nationwide offered for sale additional PIP that would take a consumer's limits up to a total of $100,000/$300,000.

Notably, however, the only specific misrepresentation alleged in the Amended Complaint (as was true of the Original Complaint) has nothing to do with how much PIP coverage is available for purchase; the allegation merely is (as it was in the Original Complaint) that Nationwide is misleading consumers by using the term "full" to describe PIP limits of $15,000/$30,000. For instance, the Amended Complaint describes "Nationwide's Wrongful Conduct" as follows:

> 9. Nationwide, acting with and through its agents in Delaware, has misrepresented to large numbers of Delaware insureds (including the proposed class representatives) the limits of liability of their PIP coverage. Specifically, *Nationwide has stated* (and, on information and belief, continues to state) within "rate quotes", memoranda of insurance or other documentation, that the *purchased limits of liability for PIP coverage are "full" limits; when in fact Nationwide intends by this representation to provide only the minimum statutory limits of $15,000 per*

person and $30,000 per accident. When insureds to whom Nationwide has falsely described PIP limits as "full" tender their claims for PIP coverage to Nationwide, Nationwide takes the position that the available limits of liability for such coverage are limited to the minimum statutory amount. Similarly, when Nationwide has occasion to pay PIP benefits to such insureds, it treats their PIP limits as exhausted once the minimum statutory amount has been paid.

10. Nationwide's practice of characterizing minimum PIP limits as "full" limits is purposefully misleading, unlawful, and injurious to those insureds (including the proposed class representatives) who are targets of the practice. Nationwide knows that such insureds may, if they so request, purchase from Nationwide additional PIP limits in excess of the statutory minimum. (Such additional PIP limits are sometimes referred to, in the jargon of insurance, as "APIP.") *By falsely characterizing the minimum limits as "full" limits. Nationwide leads insureds to believe that they have purchased the fullest PIP limits of PIP coverage available;* the purpose being to discourage them from seeking to purchase additional (and relatively inexpensive) PIP limits. Nationwide pursues this purpose because its loss ratio on PIP claims has historically been unfavorable.

> 11. Whatever Nationwide's intent in characterizing minimum PIP limits as "full", that characterization is ambiguous on its face and as applied. Under Delaware law, it must therefore be construed in favor of the insureds, and against Nationwide.

(Emphasis added)

The Amended Complaint also contains "Allegations Specific to the Proposed Class Representatives." This is the principal place where Plaintiffs have attempted to remedy the lack of particularity that plagued the Original Complaint. Here, too, however, while Plaintiffs allege that Nationwide repeatedly described the PIP limits they purchased ($15,000/$30,000) as "full," there is no allegation that Nationwide said or did anything other than that to mislead Plaintiffs into thinking that additional PIP (or "APIP") was unavailable. Paragraph 13 alleges, in pertinent part:

> . . . Nationwide has represented to one or more of the proposed class representatives that the subject policy provides "full" limits of liability for PIP coverage; and it has thereafter taken the position that such limits have been exhausted by payment of the minimum statutory amount:
>
> a. In approximately March 1994 Nationwide, acting through its agent Culver Insurance Agency of Seaford, Delaware (now known as

> Muncie Insurance & Financial Services, Inc.), sold the subject policy to Mr. and Mrs. Eames. On or about March 14, 1994, and in connection with that sale, *the Culver agency (acting for Nationwide) represented that the policy would provide "full" limits of liability for PIP coverage.*
>
> . . .
>
> c. On information and belief, *one or more representatives of the Culver agency represented orally to Mr. or Mrs. Eames (or both) that the subject policy would provide "full" limits of liability for PIP coverage. . . .*
>
> . . .
>
> g. Despite its repeated representations to the contrary, Nationwide contends that Mr. and Mrs. Eames's policy provides only the minimum statutory PIP limits (of $15,000 per person and $30,000 per accident).

(Emphasis added)

C. *Judge Jordan's August 2006 Opinion*

Nationwide moved to dismiss Plaintiffs' Amended Complaint. (D.I.167,168) In his August 29, 2006 opinion, Judge Jordan dismissed the Amended Complaint's DCFA and conspiracy claims to the extent they alleged

what has come to be referred to as the "maximum limit theory." *See Eames v. Nationwide Mut. Ins. Co.*, 2006 WL 2506640 (D.Del. Aug.29, 2006) ("August Opinion"). The maximum limit theory, by which Plaintiffs argued that Nationwide misled them into believing they had purchased the maximum amount of PIP coverage ($100,000/ $300,000), was barred by the statute of limitations. "Having received the unambiguous policy document [in 1994], Plaintiffs had reason to know that any statement by Nationwide that those limits were other than $15,000/$30,000 was false. Therefore, Plaintiffs' claim that Nationwide misrepresented the PIP limits as something greater than $15,000/$30,000 arose when they received the policy in 1994, and the three-year period to bring the claim ended in 1997." *Id.* at *4 (internal citation omitted).[3]

However, Judge Jordan denied Nationwide's Motion to Dismiss to the extent the Amended Complaint was asserting the "fullest available limit theory:" the allegation that Nationwide misled Plaintiffs into believing that they had purchased the most PIP available, regardless of its dollar amount. With respect to the fullest available limit theory, Judge Jordan found

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3. As a consequence of this ruling, it was unclear whether the amount in controversy continued to exceed $75,000, as needed for diversity jurisdiction. *See* 18 U.S.C. § 1332. In subsequent filings (D.I.219, 222, 228), both parties agreed that the jurisdictional amount is established at the time of the filing of the complaint and, therefore, this Court retains jurisdiction. I agree. There is no basis for dismissing this action for lack of subject matter jurisdiction.

that the record was not sufficiently developed for him to conclude that Plaintiffs knew or should have known more than three years before filing their complaint that additional PIP was available for purchase. *See id.*[4]

D. *Subsequent Proceedings*

Plaintiffs filed a timely Motion for Reconsideration of the August Opinion. (D.I.218) After Nationwide responded, Plaintiffs filed-without seeking leave of the Court-a reply in support of the Motion for Reconsideration and a letter containing additional argument. (D.I.223, 224)

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4. Judge Jordan wrote: "Nationwide has not shown based on the Amended Complaint that Plaintiffs had reason to know prior to August 2001 that coverage with higher PIP limits was available from Nationwide. Thus, Plaintiffs' claim that Nationwide misrepresented the $15,000/$30,000 limits as the fullest PIP limits available may or may not be time-barred, depending on the record that may develop." August Opinion, 2006 WL 2506640, at *4 (internal citations omitted). Although the record before me is the same as was before Judge Jordan, it is unclear whether, in the context of the Motion to Dismiss, the parties brought to his attention the "Statement" document on which I rely below. In any event, while Nationwide asserts a statute of limitations argument as a basis for dismissing the fullest available limit claims, see D.I. 168 at 17, at the hearing before me Nationwide's counsel stated that the record would need further development to establish this defense, see D.I. 244 at 43-44. Because I believe the Amended Complaint should be dismissed on other grounds, I will not reach the statute of limitations issue.

Appendix C

On December 15, 2006, Judge Jordan was elevated to the U.S. Court of Appeals for the Third Circuit and this case was reassigned to the judicial vacancy. (D.I.232) It was referred to Magistrate Judge Mary Pat Thynge and then to myself. (D.I.232, 236) On January 18, 2008, I heard oral argument from counsel on the three pending motions. (D.I.243) On February 1, 2008, the case was reassigned to Judge Joseph J. Farnan, Jr. and then, on February 14, 2008, referred, again, to me. (D.I.246)

II. LEGAL STANDARDS

A. *Motion for Reconsideration*

The Federal Rules of Civil Procedure do not mention either motions for reconsideration or reargument. *See Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va.1983). Courts often treat such motions as motions to alter or amend a judgment, authorized by Fed. R. Civ. P. 59(e). *See Silva Rivera v. State Ins. Fund Corp.*, 488 F. Supp. 2d 72, 77 (D.P.R.2007). Regardless of their title, motions for reconsideration or reargument are to be granted only sparingly. *See Pirelli Cable Corp. v. Ciena Corp.*, 988 F. Supp. 424, 445 (D.Del.1998); *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D.Del.1991). They are not to be used simply to rehash arguments which have been previously briefed by the parties and considered and decided by the Court. *See Corning Inc. v. SRU Biosystems*, 2006 WL 155255, at *3 (D.Del. Jan. 20, 2006); *Schering Corp. v. Amgen, Inc.*, 25 F.Supp.2d 293, 295 (D. Del. 1998).

Accordingly, a motion for reconsideration or reargument will only be granted where one or more of the following conditions are satisfied: (i) the Court has patently misunderstood a party; (ii) the Court has made a decision outside of the adversarial issues presented to it by the parties; (iii) the Court has made an error not of reasoning but of apprehension; (iv) there has been a change in the controlling law; (v) there is newly available evidence; or (vi) there is a need to correct a clear error of law or fact to prevent manifest injustice. *See Donald M. Durkin Contracting, Inc. v. City of Newark*, 2006 WL 2724882, at *3 (D. Del. Sept. 22, 2006); *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1241 (D.Del.1990). Even where one or more of these conditions is satisfied, the Court may deny the motion where it would not alter the outcome. *See Becton Dickinson & Co. v. Tyco Healthcare Group LP*, 2006 WL 890995, at *2 (D. Del. Mar. 31, 2006); *Brambles*, 735 F. Supp. at 1240.

B. *Motion to Strike*

The District of Delaware Local Rules, which govern civil proceedings in this District, do not permit reply briefs to be filed in connection with motions for reconsideration or reargument without leave of the Court. *See* D. Del. LR 7.1.5 ("The Court will determine from the motion and answer whether reargument will be granted."). Obviously, the Court has authority to require parties to comply with its local rules. *See generally United States v. Eleven Vehicles*, 200 F.3d 203, 214 (3d Cir. 2000) ("Local court rules play a significant

role in the district courts' efforts to manage themselves and their dockets.").

C. *Motion to Dismiss Pursuant to Rule 12(b)(6)*

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." A motion to dismiss requires a court to accept as true all material allegations of the complaint. *See Spruill v. Gillis*, 372 F.3d 218, 223 (3d Cir. 2004). "To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact) .' " *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) (internal citations omitted)).

While heightened fact pleading is not required, "enough facts to state a claim to relief that is plausible on its face" must be alleged. *Bell Atlantic*, 127 S.Ct. at 1974. The Court is not obligated, however, to credit or accept as true "bald assertions," *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997), "unsupported conclusions and unwarranted inferences," *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997), or allegations that are "self-evidently false," *Nami v. Fauver*, 82 F.3d 63, 69 (3d Cir. 1996).

Nonetheless, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir.1997) (internal quotation marks and citation omitted). Thus, a court may grant a motion to dismiss only if, after "accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." *Maio v. Aetna, Inc.*, 221 F.3d 472, 481-82 (3d Cir.2000) (internal quotation marks and citations omitted).

D. *Motion to Dismiss Pursuant to Rule 9(b)*

In pertinent part, Federal Rule of Civil Procedure 9(b) provides that "[i]n alleging fraud . . . a party must state with particularity the circumstances constituting fraud. . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The purpose of Rule 9(b) is to provide defendants with notice of the precise nature of the claim against them, not to test the factual allegations of the claim. *See Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). Although date, place, and time allegations may fulfill the requirement of pleading with particularity, these types of allegations are not required to satisfy Rule 9(b), so long as the circumstances of the alleged fraud are plead sufficiently "to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Id.*

As both parties have recognized, Rule 9(b) applies to claims arising under the Delaware Consumer Fraud Act. *See* D.I. 241; *Johnson v. Geico Cas. Co.*, 516 F.Supp.2d 351, 359 (D.Del.2007); February Opinion, 412 F.Supp.2d at 437-38.

III. DISCUSSION

A. *Plaintiffs' Motion for Reconsideration*

By their Motion for Reconsideration, Plaintiffs ask that the Court reverse Judge Jordan's ruling that the portion of Plaintiffs' claims predicated on the maximum limit theory is barred by the three-year statute of limitations. (D.I. 218 at 4) Plaintiffs essentially allege that Nationwide's misrepresentations were ongoing and reiterated with every six-month renewal of their policy, through 2003, and therefore the 2004 Original Complaint was filed within the appropriate statutory period. Additionally, Plaintiffs claim that their post-accident purchase of APIP (bringing their total PIP limits to $100,000/ $300,000), and Nationwide's arguments about that purchase in connection with briefing on the Motion for Reconsideration, undermine Judge Jordan's conclusion that the 1994 policy unambiguously established PIP coverage of just $15,000/ $30,000. At the hearing before me, Plaintiffs further asked me to reconsider Judge Jordan's February Opinion dismissing the declaratory judgment and contract claims. (D.I. 244 at 37)

I find that Plaintiffs have failed to meet the stringent standards for reconsideration. Assuming, *arguendo*, that Plaintiffs have identified "newly available evidence," that evidence does not alter the outcome. As explained below in connection with the Motion to Dismiss, the policy and related documents unambiguously established that Plaintiffs purchased only $15,000/ $30,000 PIP coverage; they further establish that Plaintiffs were advised in writing that additional PIP was available for purchase. Nothing about Plaintiffs' arguments regarding their 2003 purchases alters that conclusion.

Accordingly, I recommend that Plaintiffs' Motion for Reconsideration be denied.

B. *Nationwide's Motion to Strike*

Plaintiffs filed their Motion for Reconsideration of the August Opinion on August 31, 2006. (D.I.218) After Nationwide filed a timely response (D.I.220), on September 19, 2006 Plaintiffs filed a reply brief and a letter containing additional argument for reconsideration (D.I.223, 224). Thereafter, on September 21, 2006, Nationwide filed a Motion to Strike Plaintiffs' reply brief and letter. (D.I.225) In the alternative, Nationwide sought leave to file a sur-reply in opposition to Plaintiff's Motion for Reconsideration. *Id.*

D. Del. LR 7.1.5 provides that: "The Court will determine from the motion and answer whether

reargument will be granted." This rule applies to motions for reconsideration as well as motions for reargument. *See, e.g., Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 2006 WL 2435084, at *2 (D.Del. Aug.6, 2006). It means, as it says, that replies and sur-replies and other supplemental filings are not permitted with respect to such motions without leave of the Court. *See Stairmaster Sports/Medical Products, Inc. v. Groupe Procycle, Inc.*, 25 F. Supp. 2d 270, 292 (D. Del. 1998) (Local Rule 7.1.5 "permits filing of only one brief per side with an emphasis on brevity").

As Judge Farnan has well explained, motions for reconsideration or reargument do not generally involve reply briefs, as these briefs only exacerbate the deviation from the general norm of finality that such motions already constitute:

> [M]otions for reconsideration may not be used to allow a never-ending polemic between litigants and the Court. In the Court's view, the filing of a reply brief frustrates that principle and encourages a cycle of endless litigation on issues already decided by the Court. . . .

Power Integrations, 2006 WL 2435084, at *2 (internal citations and quotation marks omitted).

Here, Plaintiffs should have sought leave of the Court before filing their reply brief or letter containing further argument in support of their Motion for

Reconsideration. However, I will dismiss the Motion to Strike as moot because at the hearing before me I gave Nationwide a full opportunity to respond to all of Plaintiffs' filings. I also gave Nationwide the opportunity to file a sur-reply brief, but Nationwide declined. (D.I.245)

C. *Nationwide's Motion to Dismiss*

1. *Documents to be Considered*

Ordinarily, in reviewing a motion to dismiss, a court may only consider the complaint. *See* 5B C. Wright & A. Miller, Federal Practice and Procedure § 1357 (2007) ("In determining whether to grant a Federal Rule 12(b)(6) motion, district courts primarily consider the allegations in the complaint."); *see also Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1195 (3d Cir.1993) ("Courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record."). It is well-settled, however, that certain additional materials may be considered without converting a motion to dismiss into a motion for summary judgment (which generally cannot be ruled upon without providing a plaintiff a reasonable opportunity for discovery). Thus, for instance, the Third Circuit has held, "[A] court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document. . . ." *Pension Benefit*, 998 F.2d at 1196 (internal citations omitted); *see also* 5B C. Wright & A. Miller, Federal

Practice and Procedure § 1357 (2007) ("The court is not limited to the four corners of the complaint, however. Numerous cases . . . have allowed consideration of matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment.").

The general principle is that a plaintiff is entitled to notice and a fair opportunity to respond to any evidence the court might consider in reviewing a motion to dismiss; where a plaintiff had such notice-as will be evident, for example, where the plaintiff is asserting claims that rely on and are based on such documents-it is proper for a court to consider such documents in the context of a motion to dismiss. *See Pension Benefit*, 998 F.2d at 1196-97 ("The reason that a court must convert a motion to dismiss to a summary judgment motion if it considers extraneous evidence submitted by the defense is to afford the plaintiff an opportunity to respond. When a complaint relies on a document, however, the plaintiff obviously is on notice of the contents of the document, and the need for a chance to refute evidence is greatly diminished.") (internal citations omitted).

Applying these principles here, I will consider, in addition to the Amended Complaint, the insurance policy Plaintiffs purchased from Nationwide in 1994. Plaintiffs' claims are based on the insurance policy. *See* D.I. 1, 4,

158, 168. Here, the policy consists of the policy document as well as all declarations and endorsements. *See* February Opinion, 412 F.Supp.2d at 436; D.I. 244 at 60, 69.

Another document the Court will consider is the "Delaware Motorists Protection Act Required Statement to Policyholders" (hereinafter "Statement"). This is a document Nationwide was required by Delaware law to give to Plaintiffs when they made their initial purchase of insurance; it is undisputed that Nationwide did so and that Thomas Eames reviewed and signed the Statement. *See, e.g.*, D.I. 244 at 10, 19. Nationwide attached the Statement to its Motion to Dismiss the Original Complaint. (D.I. 4 at A-50) Its authenticity is undisputed and it was considered at length during a July 14, 2006 hearing before Judge Jordan relating to class certification (*see* D.I. 215 at 31-33, discussing "form B-203," which is another copy of the Statement) as well as during the January 18, 2008 hearing before me (*see* D.I. 244 at 9-20, 58-59). Plaintiffs' claims are based, in part, on the Statement, as the Statement constitutes a written representation to Plaintiffs at the time of their initial insurance purchase as to how much PIP was available for purchase and what "full" PIP means. *See* Amended Complaint (D.I.158) ¶ 13.a-d (alleging that misrepresentations were in form of documents and/or oral statements). Finally, and crucially, both parties expressed familiarity with the Statement and insisted that the Court may consider it in resolving the Motion to Dismiss. (D.I. 244 at 9-10, 18-20, 58)

Appendix C

2. *Consumer Fraud Claim*

In pertinent part, the Delaware Consumer Fraud Act ("DCFA"), a statute which provides for a private cause of action against insurance companies, states:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

6 Del. C. § 2513.

As Judge Jordan explained in his February Opinion:

> . . . With three exceptions, "the statute must be interpreted in light of established common law definitions and concepts of fraud and deceit." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Thus, as would be required for a claim of common law fraud, a plaintiff alleging a violation of the consumer fraud statute must show both "a false representation, usually one of fact made by the defendant" and "damage to the plaintiff."

> *Id.* However, the statute does depart from the common law in the following ways: (1) "a negligent misrepresentation is sufficient to violate the statute," (2) a violation of the statute is "committed regardless of actual reliance by the plaintiff," and (3) the plaintiff need not show "intent [by the defendant] to induce action or inaction by the plaintiff." *Id.* Allowing a negligent misrepresentation to suffice means that "[t]he defendant need not have intended to misrepresent or to make a deceptive or untrue statement," and thus, "the only intent requirement of the Act is that in omitting or concealing a material fact, the defendant must have intended that others rely on the omission or concealment." *Id.*

412 F. Supp. 2d at 437.

Thus, in order to state a DCFA claim on which relief may be granted, Plaintiffs must allege at least a negligent misrepresentation or omission of a material fact by Nationwide with the intent that Plaintiffs rely on such misrepresentation or omission. Because Rule 9(b) applies to claims arising under DCFA, *see Johnson*, 516 F. Supp. 2d at 359, Plaintiffs must plead such misrepresentation or omission with particularity. In my view, Plaintiffs have failed to do so.

As already noted, the misrepresentation Plaintiffs allege is that Nationwide described the statutory minimum PIP coverage of $15,000/$30,000 as "full" PIP

coverage. However, review of the policy documents, and particularly the Statement, demonstrates that this is not a misrepresentation. In the context of the insurance policy purchased by Plaintiffs, "full" PIP coverage means coverage up to $15,000/$30,000 with no deductible (i.e. zero deductible).

This is evident from the Statement, which contains a box in which a consumer may select PIP "Options." Option 3 is *"Full Coverage with no Deductible"* (emphasis added). The copy of the Statement in the record shows that on March 14, 1994, Thomas Eames (with the assistance of an agent) selected Option 3. In the related column for identifying the amount of deductible for his PIP, no amount is checked and no amount is written in-indicating, again, zero deductible. *See also* D.I. 4 at A-25 (policy describing collision coverage and stating "full coverage" means "no deductible;" "We will pay for the loss less your deductible. However, we will not subtract the deductible amount for broken glass if you have full (no deductible) comprehensive coverage in force.").[5] Consistent with this selection, Nationwide provided Plaintiffs with PIP limits of $15,000/$30,000 and did not subtract any deductible in connection with Plaintiffs' claim following their February 2003 accident.

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5. During the hearing before me, Plaintiffs' counsel acknowledged that in the Statement "full coverage" means "full coverage with no deductible." (D.I. 244 at 11-13) He questioned, however, what "full coverage with no deductible" means.

Appendix C

A better argument, although one Plaintiffs do not expressly articulate, is that Nationwide's failure affirmatively to advise consumers of the availability of additional PIP coverage beyond $15,000/$30,000—also known as APIP—is an actionable omission of a material fact. On the record before me, there is no evidence that anyone associated with Nationwide verbally advised Plaintiffs of the availability of APIP. However, the documentary record dooms this argument, too, to rejection. For the Statement demonstrates repeated written representations to Thomas Eames as to the availability of APIP.

The Statement, which is a one-page document, consists largely of a three-column table. Each column indicates that $15,000/$30,000 is not the maximum PIP available. Under Column A, "Coverages," in the box applying to "No-Fault" insurance, the Statement reads: *"Additional Personal Injury Protection available by selecting higher limits"* (emphasis added). Next to this entry, under Column B, listing "Options," Option 1 reads: "I WANT: *Additional limits* as shown in Column C;" Option 2, by contrast, is "Minimum Limits." In the next box over to the right, under "Selection," there are blanks to be filled-in to indicate the "Personal Injury Protection Limits" for "Each Person" and "Each Accident." That is, Column C provides a place in which to write any "Additional limits" of PIP the consumer has chosen to purchase.

Other portions of the Statement confirm the availability of PIP with higher limits than $15,000/

$30,000. At the bottom of the Statement, the following note appears: "It is not the intent of this statement to limit or discourage the *purchase of increased limits* of liability *and personal injury protection coverages*, or other additional coverages which may be available from the company" (emphasis added). Additionally, the following appears near the top of the Statement: "The owner of a motor vehicle registered in the State of Delaware is required to purchase *at least the following minimum insurance coverages and limits of liability under the Delaware Motorists' Protection Act:* . . . Personal Injury Protection: ($15,000 each person; $30,000 each accident)" (emphasis added). With this, the Statement is advising the consumer that $15,000/$30,000 is the "minimum" amount of PIP insurance he or she may carry. *See* D.I. 244 at 15-16 (Plaintiffs' counsel acknowledging that Statement represents that $15,000/$30,000 is "minimum coverage"). In connection with the remainder of the Statement, and particularly the references under Columns A and B to "[a]dditional" PIP limits, this note is a further representation that PIP coverage above $15,000/$30,000 is available.

Plaintiffs argue that the Statement helps their case because it is "confusing" and filled out in a manner contrary to the position Nationwide has advocated. They emphasize that while the "Minimum Limits" option is checked under Column B, in Column C the Nationwide agent wrote $15,000 per person and $30,000 per accident. (D.I. 244 at 10-11) To Plaintiffs, therefore, it is unclear whether Thomas Eames selected Option 1—"Additional limits as shown in Column C"—or Option 2,

the "Minimum Limits."[6] Whether the manner in which the Statement was completed is more consistent with the view that Thomas Eames purchased PIP limits of just $15,000/$30,000 or, instead, purchased the minimum of $15,000/$30,000 plus additional coverage of $15,000/$30,000—for a total of $30,000/$60,000—is irrelevant. What matters is that nothing about how the Statement was filled out contradicts the representations throughout the form that additional PIP limits beyond $15,000/$30,000 were available to purchase.

The closest the Amended Complaint comes to alleging a misrepresentation is when it vaguely claims that "Nationwide *leads insureds to believe* that they have purchased the fullest PIP limits of PIP coverage available." (D.I. 158 at ¶ 10) (emphasis added) If Nationwide made affirmative statements, verbally or in documents, to lead Plaintiffs to believe that the most PIP they could purchase was $15,000/$30,000, Plaintiffs would likely state a claim under the DCFA. However, nowhere does the Amended Complaint explain what statements Nationwide made, or when or in what format or by whom, to lead Plaintiffs to such a belief. As Plaintiffs' counsel conceded at the hearing before me, there is no allegation that Plaintiffs were ever told that $15,000/$30,000 was the most PIP that was available. Again, all that is alleged—with respect to the class and

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6. The Statement also contains checkboxes to select "Minimum Limits" for Bodily Injury Liability, Property Damage Liability, and Uninsured/Underinsured Vehicle Coverage, but the only "Minimum Limits" box that is checked is the one for PIP.

with respect to Plaintiffs themselves—is repeated representations that the $15,000/$30,000 purchased by Plaintiffs was "full" PIP limits. This is not, in my opinion, a sufficient allegation that Nationwide misrepresented that no further PIP could be bought. Even if this allegation is viewed as a misrepresentation, it is not pled with sufficient particularity to put Nationwide on notice as required by Rule 9(b).

In the end, this is the perhaps rare case in which the pleadings and documents on which the Court is permitted to rely show that Plaintiffs have not stated a claim on which relief may be granted.[7] These materials show there was no material misrepresentation or omission. Plaintiffs cannot be granted relief even if they prove all that they have alleged with respect to Nationwide's assurances they were receiving "full" PIP

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7. *See, e.g., Case v. State Farm Mut. Auto. Ins. Co.*, 294 F.2d 676 (5th Cir.1961) (affirming dismissal of a wrongful termination claim where contract terms, which were attached to complaint, showed plaintiff was employee at will and defendant had right to terminate without cause); 5B C. Wright & A. Miller, Federal Practice and Procedure § 1357 (2007) (discussing grants of dismissal under 12(b) (6) where "the plaintiff has pleaded himself or herself out of federal court" and citing as an example, *Case*, where "it was clear on the face of the pleading and the attached document that the plaintiff had not stated an actionable claim").

Therefore, again, I recommend that Nationwide's Motion to Dismiss be granted.[8]

3. *Civil Conspiracy Claim*

Plaintiffs' civil conspiracy claim "is not an independent cause of action, and ... must be predicated on an underlying wrong." *Tracinda Corp. v. Daimler Chrysler AG*, 197 F. Supp. 2d 42, 74 (D. Del. 2002). Because I have recommended that the DCFA claim be

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8. To the extent my recommendation of dismissal is based on Rule 9(b), it might be argued that Plaintiffs should be permitted leave to re-file their complaint. I do not believe so, for two reasons. First, Plaintiffs have already amended their complaint once in response to Judge Jordan's earlier dismissal of the Original Complaint for failure to satisfy Rule 9(b). I see no reason why Plaintiffs should be permitted a third bite at the apple. Second, the Statement and deposition testimony (which both parties have brought to my attention, D.I. 244 at 64-66) show that Nationwide did not affirmatively state to Plaintiffs that higher PIP limits were unavailable. *See, e.g.*, Thomas Eames deposition transcript (D.I.198) at A-147 ("I'm assuming I'm getting 100/300 on PIP because she's telling me I got full coverage."); *id.* ("I thought she was giving me 100/300 because she told me I had full coverage."); *id.* at A-148 ("When I asked if I had full coverage she told me yes. That's specific enough."); Roberta Eames deposition transcript (D.I.198) at A-167 (testifying that she did not recall specifically what was said verbally about full coverage). Indeed, Mr. Eames testified that he thought he had purchased more than the minimum amount of PIP—"I thought it was minimum *plus* another 15 and 30," D.I. 198 at A-148 (emphasis added)-which seems to indicate he had knowledge that something more than the minimum of $15,000/$30,000 was available.

dismissed, it follows that I must also recommend that the dependent civil conspiracy claim also be dismissed.

IV. CONCLUSION

For the reasons set forth above:

1. I recommend that Plaintiffs' Motion for Reconsideration be DENIED.

2. I recommend that Nationwide's Motion to Dismiss be GRANTED.

3. It is hereby ORDERED that Nationwide's Motion to Strike is DISMISSED as moot.

Dated: March 31, 2008

s/ Leonard P. Stark
The Honorable Leonard P. Stark
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 13, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4125

THOMAS A. EAMES, ROBERTA L. EAMES, and TAMMY EAMES, on behalf of themselves and all others similarly situated

Appellants

v.

NATIONWIDE MUTUAL INSURANCE COMPANY

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES and HARDIMAN, *Circuit Judges*

The Petition for Rehearing filed by the Appellants in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular

service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: October 13, 2009

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
FEB 8 - 2010
OFFICE OF THE CLERK

No. 09-809

In The
Supreme Court of the United States

THOMAS A. EAMES, ROBERTA L. EAMES
and TAMMY EAMES,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari significantly misstates both the facts and the law bearing on the issues which would properly be before the Court if certiorari were granted. Accordingly, although Respondent would not otherwise be required to file a brief in opposition to the Petition under this Court's Rule 15.1, Respondent is obligated to address such misstatements in this brief, pursuant to Rule 15.2.

In addition, and in accordance with Supreme Court Rule 15.2, Respondent objects to the questions presented. Respondent suggests that if this Court grants the Petition, Petitioners' questions should rephrased as the following more accurately phrased single question:

> *Where fraud is not a necessary element of a claim, but a plaintiff nonetheless bases his claim on allegations that a defendant engaged in fraudulent conduct, do the Circuit Courts of Appeal incorrectly apply the heightened pleading requirements under Federal Rule of Civil Procedure 9(b)?*

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Nationwide Mutual Insurance Company states that it is a mutual insurance company organized under Ohio law. As such, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Petitioners ask this Court to review an unpublished non-precedential Third Circuit Court of Appeals' decision that neither announces a rule of law nor addresses the federal questions outlined in the Petition. In any event, the federal appeals courts are unanimous in holding that claims grounded in fraud must be pled with the particularity required by Federal Rule of Civil Procedure 9(b), even if fraud is not an essential element of the sued-upon claim.

Faced with this unanimity among the circuits, Petitioners cite cases in which a plaintiff pled negligent misrepresentation to try and manufacture a conflict. While certain federal courts do not apply the particularity required by Rule 9(b) to negligent misrepresentation claims, Petitioners did not plead negligent misrepresentation in this case. Consequently, the allegedly "conflicting" cases upon which Petitioners rely have no application to the facts of this case.

Apart from the lack of a conflict, certiorari is unwarranted because the Third Circuit ruled on an independent and alternate state law ground. After the parties invited the District Court to consider matters outside the four corners of the Amended Complaint, that court found Petitioners' state law claims legally insufficient. Reversal would therefore result in nothing more than an advisory opinion.

COUNTERSTATEMENT OF THE FACTS

Respondent Nationwide Mutual Insurance Company offers auto insurance policies, which include personal injury protection ("PIP") coverage, to Delaware residents. (App. 3a). Petitioners Thomas and Roberta Eames, husband and wife, are named insureds under such a Nationwide auto policy. (App. 3a). The Eameses and their daughter Tammy, a resident relative, were injured in an auto accident. (App. 3a). They tendered claims for PIP benefits to Nationwide, and Nationwide paid those benefits. (App. 3a).

Petitioners nonetheless brought this proposed class action lawsuit against Nationwide, contending that Nationwide did not pay "full" PIP limits. (App. 3a). Petitioners acknowledged that their policy contained the minimum PIP benefits of $15,000/$30,000 (App. 20a), but claimed Nationwide generally misrepresented that they purchased "full" PIP limits. (App. 3a). Among other contract and fraud-based theories, Petitioners sought recovery against Nationwide for violations of Delaware's Consumer Fraud Act ("DCFA"). (App. 3a). Petitioners maintained Nationwide's characterization of PIP limits as "full" was false and misleading under the DCFA. (App. 3a). Petitioners did not allege a negligent misrepresentation theory to support their DCFA claim. (App. 3a).

Upon Nationwide's motion, the District Court dismissed the DCFA claim, with leave to amend.

(App. 4a). The District Court found that, although the initial complaint may have alleged fraud under the DCFA, it did not do so with the required particularity. (App. 4a).

Petitioners filed an amended complaint, attempting to replead their DCFA claim. (App. 4a). They pled their substantive allegations "on information and belief" and in the alternative. (Nationwide App. 7). Again, Petitioners did not plead negligent misrepresentation to support their fraud-based claims under DCFA, but, rather, pled a scheme of fraudulent misrepresentation. (Nationwide App. 4-5). Specifically, in pertinent part, they alleged:

> ***Nationwide***, acting with and through its agents in Delaware, ***has misrepresented*** to large numbers of Delaware insureds (including the proposed class representatives) the limits of liability of their PIP coverage. Nationwide stated that the purchased limits of liability for PIP coverage are "full" limits; when in fact ***Nationwide intends by this representation*** to provide only the minimum statutory limits of $15,000 per person and $30,000 per accident. When insureds to whom Nationwide has ***falsely described*** PIP limits as "full" tender their claims for PIP coverage to Nationwide, Nationwide takes the position that the available limits of liability for such coverage are limited to the minimum statutory amount. . . . Nationwide's practice of characterizing minimum PIP limits as "full" limits is ***purposefully misleading*** unlawful, and injurious to those

> insureds (including the proposed class representatives) who are targets of the practice. . . . By ***falsely characterizing*** the minimum limits as "full" limits, ***Nationwide leads insureds to believe*** that they have purchased the fullest PIP limits or PIP coverage available; the purpose being to discourage them from seeking to purchase additional (and relatively inexpensive) PIP limits. ***Nationwide pursues this purpose*** because its loss ratio on PIP claims has historically been unfavorable. (Nationwide App. at 4-5) (emphasis added).

Nationwide moved to dismiss the amended complaint. (App. 4a). The District Court dismissed a portion of the claims in the Amended Complaint based upon the applicable statute of limitations and referred the remaining dismissal issues to the Magistrate. (App. 5a).

The Magistrate rendered two distinct rulings in his Report and Recommendation. (App. 39a, 44a). First, he concluded Petitioners failed to plead fraud with the required particularity. (App. 39a). The Magistrate did not analyze the applicability of Rule 9(b) because Petitioners acknowledged in the district court proceedings that the heightened pleading requirements apply to the DCFA. (App. 32a).

Alternatively, based upon the parties' invitation, the Magistrate considered additional documents outside the four corners of the amended complaint. (App. 35a-37a). After reviewing the pleadings and

these additional documents, the Magistrate held that the policy documents demonstrated Nationwide's description of the statutory minimum PIP coverage of $15,000/$30,000 as "full" PIP coverage was not a misrepresentation and that "full" PIP coverage meant coverage up to $15,000/$30,000 with no deductible (i.e. zero deductible). (App. 40a). The Magistrate emphasized that Petitioners' depositions confirmed the correctness of this ruling on the Petitioners' fraud-based claims. (App. 45a, n.8).

The District Court adopted the Magistrate's Report and Recommendation and denied Petitioners' objections. (App. 9a). In doing so, the District Court concurred that the heightened pleading requirements applied to Petitioners' DCFA claims and agreed with the Magistrate's conclusion that the Amended Complaint's allegations were not pled with the required particularity. (App. 14a-15a). The District Court likewise found the Magistrate's other reasons supporting dismissal were not erroneous. (App. 16a).

Petitioners appealed the various dismissal orders. In an unpublished non-precedential opinion written "primarily for the parties," the Third Circuit affirmed. (App. 3a). In doing so, the Third Circuit noted that, among other things, Petitioners challenged: (1) applying heightened pleading requirements in statutory consumer protection claims; and (2) the Magistrate's ruling on the merits. (App. 2a, 5a). After referencing the legal arguments Petitioners raised, and without further comment or

analysis of their Rule 9(b) argument,[1] the Third Circuit affirmed, stating:

> In three extensive written opinions, the District Court carefully and thoroughly considered the contentions that the parties raise in this appeal. After a complete review of the record and the parties' arguments, we find no basis for disturbing the District Court's rulings. Therefore, we will affirm the judgments substantially for the reasons set forth by the District Court in its written opinions. (App. 6a).

On October 13, 2009, the Third Circuit denied Petitioners' Motion for Panel and *En Banc* Rehearing.

REASONS FOR DENYING THE WRIT

I. There Is No Clear And Direct Conflict Between The Third Circuit's Decision And Those Of Other Circuit Courts Of Appeal.

Supreme Court Rule 10(a) emphasizes that a petition for a writ of certiorari will be granted only for compelling reasons, such as where a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Petitioners

[1] The Third Circuit did provide, however, a short analysis of its reason to affirm Plaintiffs' statute of limitations argument, which is not at issue here. (App. 6a).

claim that the Third Circuit's unpublished non-precedential decision conflicts with decisions from other Circuits on the issue of whether Rule 9(b)'s heightened pleading standard applies to claims provable on a showing of negligent misrepresentation under state consumer protection statutes. No such conflict exists.

A. The Opinion Is Unpublished, Has No Circuit Precedential Value, And Announces No Rule Of Law.

The Third Circuit opinion lacks sufficient importance to merit review by this Court. The decision is unpublished and designated "Not Precedential." *See* Third Circuit IOP 5.3.[2] The fact that an opinion is unpublished and non-precedential is not a complete bar to Supreme Court review, but such an opinion lacks the precedential value needed to create a genuine conflict and, thus, undermines the need for review. Second, in its opinion written "primarily for the parties," the Third Circuit simply adopted the

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[2] Third Circuit IOP 5.3 provides in pertinent part: "An opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential . . . " IOP 5.7 further provides: "The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing." Although the copy of the Third Circuit's opinion printed in Petitioners' appendix does not contain the phrase "Not Precedential," the original does.

orders of the District Court. The Third Circuit's unpublished non-precedential opinion does not establish, alter, modify, or clarify a rule of law. It contains no unique factual findings or extensive legal analysis that may be applied by courts in future cases. The Third Circuit's opinion can be cited for the unremarkable proposition that it affirmed the result reached by the District Court for the reasons set forth in the District Court's orders, and nothing more. Therefore, the opinion is not worthy of review by this Court.

For the petition to be certworthy, the Third Circuit's opinion must clearly disagree with another Circuit Court of Appeal on a point of law. It does not. While it might be inferred that the Third Circuit held that Rule 9(b) applies to statutory consumer protection claims, such an inference is neither "clean" nor "deep." In short, Petitioners have concocted this split between the Third and other Circuits based on nothing more than rampant speculation and assumptions.[3] This case does not present an appropriate vehicle for deciding a rule of law on which the Third Circuit never weighed-in.

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[3] Indeed, only Petitioners generated a conflicting position. Petitioners initially admitted Rule 9(b) applied to the DCFA, but now assert differently. (App. 32a).

B. Petitioners Incorrectly Represent The Facts Of This Case And The Holdings Of The Cases Upon Which They Rely To Show A Conflict.

Contrary to their representations, Petitioners did not plead a claim for negligent misrepresentation. See *supra* at 3. Accordingly, the cases that Petitioners cite in which negligent misrepresentation *was* pled are inapposite and cannot be the basis for conflict. See e.g. *In re NationsMart Corp. Securities Litigation*, 130 F.3d 309, 315 (8th Cir. 1998) ("In their complaint, the plaintiffs made clear that they did not allege in the context of their § 11 claim that the defendants were liable for fraudulent or intentional conduct.")

In fact, when read in their entirety, the holdings of the cases Petitioners cite are perfectly consistent with the result reached here. In these cases, the Circuit Courts explain that the heightened pleading rule applies to claims grounded in fraud.[4] For

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[4] *Tricontinental Industries, Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007) ("[t]he federal rules impose more stringent pleading requirements upon complaints charging fraud than on complaints charging other types of misconduct."); *Baltimore County v. Cigna Healthcare*, 238 Fed.Appx. 914, 922 (4th Cir. 2007) (fraud allegations of a complaint must satisfy heightened pleading standards); *American Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 115 Fed.Appx. 662 (5th Cir. 2004) (recognizing that where fraud allegations are made in same complaint as pleaded negligent misrepresentation claims, the fraud claims must comply with Rule 9(b)). In *American Realty Trust*, the Fifth Circuit further

(Continued on following page)

instance, in *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-4 (9th Cir. 2003), the Ninth Circuit recognized:

> Vess is correct that fraud is not an essential element of the California statutes on which he relies. But he is not correct in concluding that his averments of fraud therefore escape the requirements of [Rule 9(b)].
>
> In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).

Most recently, the Ninth Circuit, citing *Vess,* applied Rule 9(b) to a state consumer fraud claim because the complaint was premised upon fraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009).

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noted that in cases where appellants failed to distinguish their negligent misrepresentation claims in their appellate briefs and argue them separately from their fraud claims, they waived the argument that their negligent misrepresentation claims should not have been dismissed because they were not subject to Rule 9(b) and its particularized pleading requirement. 115 Fed.Appx. at 669, n.30.

At bottom, to avoid the unwanted language of the very case law they cite and support their fabricated "split," Petitioners: (1) ignore their fraud allegations; and (2) imply they pursued a negligent misrepresentation claim without delineating such allegations. But their Amended Complaint reveals otherwise.[5] So, just as other Circuit Courts hold, the Third Circuit's result is correct: Rule 9(b)'s particularity requirement applies in this case because Petitioners' DCFA claim was grounded in fraud.[6]

This Court has repeatedly denied petitions presenting the same question. *Merix Corp. v. Central Laborers Pension Fund*, 129 S.Ct. 763 (2008); *United States ex rel. Corsello v. Lincare, Inc.*, 549 U.S. 810 (2006); *Anderson v. Clow*, 520 U.S. 1103 (1997). This Court should do the same here.

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[5] Petitioners likely avoided alleging a negligent misrepresentation claim to strengthen their punitive damage demand. *Stephenson v. Capano Dev't, Inc.*, 462 A.2d 1069, 1076-77 (Del. 1983) (recovery of punitive damages under the DCFA requires finding of gross, oppressive, or aggravated fraud).

[6] Certain circuit courts hold that allegations of fraud in a complaint that only requires negligence allegations would be mere surplusage; the allegations of fraud would then be stripped from the claim and the allegations of innocent or negligent misrepresentation would survive. *In re NationsMart Corp. Securities Litigation*, 130 F.3d 309, 315 (8th Cir. 1998). This rule would not save Petitioners here where Petitioners alleged ***only*** fraud, not negligence.

C. Petitioners Effectively Ask This Court To Address An Issue Of Delaware State Law.

At bottom, this case involves an underlying question of state law that only the Delaware Supreme Court has the power to decide.

Petitioners claim the "Third Circuit requires that statutory consumer fraud claims be pled with particularity." (Pet. at 13). This statement is inaccurate. The Third Circuit has not directly addressed this issue, either below or in any other case. Rather, district courts within the Third Circuit have turned to Delaware state court decisions to resolve the question of what the DCFA requires.

The Delaware state courts continue to refine the circumstances under which a heightened pleading requirement applies to the DCFA. For instance, Petitioners cite *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001), to argue that the heightened pleading requirements do not apply to the DCFA. (Pet. at 14, n.3). However, *Publishers Clearing House* did not address private causes of action under the statute. Courts have distinguished *Publishers Clearing House* and found that Delaware state courts apply the heightened pleading requirement to a ***private*** cause of action under the DCFA, such as the one Petitioners brought here. See *Coleman Dupont Homsey v. Vigilant Ins. Co.*, 496 F. Supp. 2d 433 (D. Del. 2007) citing *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL

1767529 (Del. Super. 2002) and *Rinaldi v. Iomega Corp.*, 1999 WL 1442014 (Del. Super. 1990). Delaware law thus continues to evolve on this issue.

This Court has generally refused to hear disputes that turn on a pure state law issue, particularly where state statutory or common law is evolving. A decision on such a question, "whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of [] certiorari jurisdiction," *Leavitt v. Jane L.*, 518 U.S. 137, 146-47 (1996) (Stevens, J., dissenting), and the Court's custom in such disputes is to "defer to the interpretation of the Court of Appeals for the Circuit in which the state is located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004); see *MacGregor v. State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942) (per curiam) ("[W]e shall leave undisturbed the interpretation [of Michigan law concerning insurance] by three circuit judges whose circuit includes Michigan.").

D. Even If The Petition Presents A Question Of Federal Procedural Law, The Decision Below Rests On An Adequate And Independent State Law Ground.

Because state law grounds can independently support the judgment, the outcome would not change even if this Court accepted review and reversed on the federal law ground. *Lynch v. New York*, 293 U.S.

52, 54-55 (1934) (jurisdiction lacking where "the ground independent of a federal question is sufficient in itself to sustain" the judgment).

Here, the Magistrate alternatively ruled on the sufficiency of Petitioners' state law claims. The parties invited the Magistrate Judge to consider documents outside the four corners of the Amended Complaint to resolve the motion to dismiss, and, after the Magistrate reviewed them, he ruled for Nationwide on Petitioners' DCFA claim. As the Magistrate recognized, this was one of the rare cases in which the pleadings and documents established Petitioners could not state a claim for relief under any set of circumstances. Without comment, both the District Court and Third Circuit affirmed Petitioners' challenge to the Magistrate's merits ruling on the state court claims.

If this Court were to issue a decision on the federal procedural issue Petitioners raise here, it would not impact this case. Three courts below rejected the merits of Petitioners' state law fraud-based claims, which is completely divorced from the answer to the federal procedural question presented. Therefore, review by this Court "could amount to no more than an advisory opinion"; accordingly, jurisdiction is lacking. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

II. This Court Does Not Resolve Intra-Circuit Conflicts.

Petitioners lastly claim this Court should accept review because the Third Circuit ***internally*** misapplies Rule 9(b). (Pet. at 16). Petitioners maintain that two inconsistent pleading requirements co-exist in the Third Circuit, one for the sale of securities and one for the sale of insurance policies. (Pet. at 16).

Although Petitioners argue the Third Circuit inconsistently applies Rule 9(b), the rules of this Court for dealing with potentially inconsistent intra-circuit law are clear. The Supreme Court does not grant certiorari to resolve intra-circuit splits. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *cf. United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942) (identifying *en banc* review as the appropriate means of resolving intra-circuit disputes). This Court has long recognized that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski*, 353 U.S. at 902.

Regardless, there is no internal Third Circuit inconsistency. The cases Petitioners cite for this alleged intra-circuit conflict are consistent with the result reached here. *In re Suprema Specialties, Inc. Securities Lit.*, 438 F.3d 256, 270 (3d Cir. 2006) ("We have held that where the plaintiff grounds these Securities Act claims in allegations of fraud – and the claims thus "sound in fraud" – the heightened pleading requirements of Rule 9(b) apply"); *In re Westinghouse Securities Litigation*, 90 F.3d 696, 717

n.20 (3d Cir. 1996) (same, in *dicta*). In this case, Petitioners' DCFA claims are premised on fraud. As explained *supra* at 9-10, federal courts apply the heightened pleading requirements of Rule 9(b) when the complaint allegations are grounded in fraud. The Third Circuit is internally – and externally – consistent on this rule of law in the context of both insurance and securities cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

THOMAS A. EAMES, ROBERTA L. EAMES and TAMMY EAMES, on behalf of themselves and all others similarly situated,	)	C.A. No. 04-CV-1324KAJ TRIAL BY JURY DEMANDED
Plaintiffs,	)	
v.	)	
NATIONWIDE MUTUAL INSURANCE COMPANY,	)	
Defendant.	)	

AMENDED CLASS ACTION COMPLAINT[1]

(Filed Mar. 31, 2009)

Plaintiffs Thomas A. Eames, Roberta L. Eames and Tammy Eames, on behalf of themselves and all others similarly situated, allege as follows:

Introduction: Nature of the Action and Summary of Facts

1. This is an action seeking recovery of compensatory damages, punitive damages~~,~~ and ~~declaratory and~~ other relief arising from defendant's ~~breaches of insurance contracts, bad faith breaches of insurance contracts,~~ violations of 6 Del. C. §2513, civil

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[1] Deletions from the text of the original complaint are shown by striking; additions are underscored.

conspiracy and otherwise wrongful conduct, all in connection with the ~~failure of~~ defendant Nationwide Mutual Insurance Company's ("Nationwide") mis-representation of the scope and amount of insurance coverage provided ~~to honor its contractual obligations~~ under certain policies of automobile insurance issued by Nationwide to members and representatives of the plaintiff class.

2. This is a class action brought on behalf of those of Nationwide's Delaware insureds to whom Nationwide has represented, as part of an auto policy ~~declarations page~~ "rate quote", memorandum of insurance or otherwise, that they enjoy "full" limits of liability for Personal Injury Protection (or "PIP") coverage under 21 Del. C. §2118, when in fact Nationwide contends or will contend that they are entitled to just the minimum PIP limits required by statute. A more detailed specification of the prospective class is alleged below.

The Parties

3. Thomas A. and Roberta L. Eames are natural persons residing at 14908 Concord Road, Seaford, Delaware 19973. They are named insureds under Nationwide "Auto Policy" 52A733616, which policy was in effect when, on February 7, 2003, they were injured in an automobile collision. Both Thomas A. Eames and Roberta L. Eames have tendered claims for PIP benefits under the subject policy to Nationwide.

4. Plaintiff Tammy Eames is a natural person residing at 14908 Concord Road, Seaford, Delaware 19973. She was an occupant of the Eames's family vehicle at the time of the February 7, 2003 collision, and suffered injuries in that collision; and she is thus entitled to PIP benefits under the subject Nationwide policy.

5. Defendant Nationwide Mutual Insurance Company is a mutual company whose principal place of business is Ohio. It is engaged in the business of insurance, and regularly sells insurance within the State of Delaware.

Factual Background Applicable to the Proposed Plaintiffs' Class

6. Nationwide is among the largest and wealthiest business entities in the world. It is a prolific underwriter of automobile insurance, including first-party medical benefits for persons injured while driving or occupying motor vehicles.

7. At all times relevant to this action, Nationwide has been among the most prolific underwriters of automobile insurance (including PIP coverage) in the State of Delaware, and has derived substantial revenues and profits from the sale of automobile insurance in Delaware.

Nationwide's Wrongful Conduct

8. Under 21 Del. C. §2118, every owner of a motor vehicle registered in this State must maintain specified forms of insurance in specified minimum amounts. Among these is PIP coverage, defined under the statute as "[c]ompensation to injured persons for reasonable and necessary expenses incurred within two years from the date of the accident" for medical services, lost earnings and other expenses. The statute further requires that PIP coverage be provided in the minimum amount of "$15,000 for any 1 person and $30,000 for all persons injured in any 1 accident."

9. Nationwide, acting with and through its agents in Delaware, has misrepresented to large numbers of Delaware insureds (including the proposed class representatives) the limits of liability of their PIP coverage. Specifically, Nationwide has ~~sold~~ stated (and, on information and belief, continues to ~~sell~~ state) ~~automobile insurance policies in Delaware that expressly state; in policy declarations~~ within "rate quotes", memoranda of insurance or other ~~policy~~ documentation, that the purchased limits of liability for PIP coverage are "full" limits; when in fact Nationwide intends by this representation to provide only the minimum statutory limits of $15,000 per person and $30,000 per accident. When insureds to whom Nationwide has falsely described PIP limits as "full" tender their claims for PIP coverage to Nationwide, Nationwide takes the position that the available limits of liability for such coverage are

limited to the minimum statutory amount. Similarly, when Nationwide has occasion to pay PIP benefits to such insureds, it treats their PIP limits as exhausted once the minimum statutory amount has been paid.

10. Nationwide's practice of characterizing minimum PIP limits as "full" limits is purposefully misleading, unlawful, and injurious to those insureds (including the proposed class representatives) who are targets of the practice. Nationwide knows that such insureds may, if they so request, purchase from Nationwide additional PIP limits in excess of the statutory minimum. (Such additional PIP limits are sometimes referred to, in the jargon of insurance, as "APIP.") By falsely characterizing the minimum limits as "full" limits, Nationwide leads insureds to believe that they have purchased the fullest PIP limits or PIP coverage available; the purpose being to discourage them from seeking to purchase additional (and relatively inexpensive) PIP limits. Nationwide pursues this purpose because its loss ratio on PIP claims has historically been unfavorable.

11. Whatever Nationwide's intent in characterizing minimum PIP limits as "full", that characterization is ambiguous on its face and as applied. Under Delaware law, it must therefore be construed in favor of the insureds, and against Nationwide.

Allegations Specific to the Proposed Class Representatives

12. Plaintiffs Thomas A., Roberta L. and Tammy Eames were injured in an automobile collision on or about February 7, 2003. As alleged above, all three qualify as insureds under Nationwide "Auto Policy" 52A733616, and for purposes of their claims for PIP benefits arising from the February 7, 2003 collision.

13. In connection with their claims for PIP benefits, the proposed class representatives have been subjected by Nationwide to the practices complained of above, including the practices alleged in paragraphs 9 and 10 above. Specifically, Nationwide has represented to one or more of the proposed class representatives that the subject policy provides "full" limits of liability for PIP coverage; and it has thereafter taken the position that such limits have been exhausted by payment of the minimum statutory amount:

a. In approximately March 1994 Nationwide, acting through its agent Culver Insurance Agency of Seaford, Delaware (now known as Muncie Insurance & Financial Services, Inc.), sold the subject policy to Mr. and Mrs. Eames. On or about March 14, 1994, and in connection with that sale, the Culver agency (acting for Nationwide) represented that the policy would provide "full" limits of liability for PIP coverage.

b. On information and belief, the document attached as Exhibit A (or one or more documents substantially identical to it) was shown to Mr. or Mrs. Eames, or both, by a representative of the Culver agency, and at the time the policy was purchased in March 1994.

c. On information and belief, one or more representatives of the Culver agency represented orally to Mr. or Mrs. Eames (or both) that the subject policy would provide "full" limits of liability for PIP coverage. These representations were made on behalf of Nationwide, and at the time the policy was sold to Mr. and Mrs. Eames in or about March 1994.

d. On information and belief, the offending representations were made by Culver employees Keith Culver, Linda Sanders or both. They may also have been made by other representatives of the Culver agency.

e. The nature of insurance is such that representations may be deemed to have been made in connection with the insurance's sale even after (and long after) the payment of an initial premium or the initial issuance of policy-related documents.[2] Representatives of the Culver agency have made such representations to Mr. and Mrs. Eames (on Nationwide's behalf) subsequent to March 1994.

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[2] *See Montalvo v. Tower Life Building*, 426 F.2d 1135, 1141-2 (5th Cir. 1970).

These representations are reflected, in whole or part, by the document attached as Exhibit B (dated February 8, 2003, and in which the Culver agency represented "PIP" as "FULL"); and by the separate document attached as Exhibit C (issued on or about June 17, 2003, and in which the Culver agency represented "PERSONAL INJURY PROTECTION" as "FULL.")

f. On or about June 13, 2003 (and in the aftermath of the February 7, 2003 collision) Nationwide advised Mr. Eames by letter that he had "exhausted his/her benefits under the PIP/NO FAULT portion of this insurance policy" (meaning the policy issued by Nationwide to Mr. and Mrs. Eames). A copy of this letter is attached as Exhibit D.

g. Despite its repeated representations to the contrary, Nationwide contends that Mr. and Mrs. Eames's policy provides only the minimum statutory PIP limits (of $15,000 per person and $30,000 per accident).

Class Certification Allegations

14. This action is brought and may properly be maintained as a class action pursuant to Superior Court Civil Rules 23(a) and (b)(1)(A), (2) and (3). Plaintiffs Thomas A., Roberta L. and Tammy Eames bring this action on behalf of themselves and all others similarly situated, as representatives of the following class and subclass:

a. All of Nationwide's Delaware insureds to whom Nationwide has represented, at any time since August 20, 2001, that they enjoy "full" limits of liability for PIP coverage under 21 Del. C. §2118, where Nationwide in fact contends or will contend that they are entitled only to the minimum PIP limits required by that statute.

b. All of Nationwide's Delaware insureds who are part of the proposed class described within subpart (a) of this paragraph, and who have been advised by Nationwide that (according to Nationwide) their available PIP limits have been exhausted by virtue of Nationwide's payment of the minimum statutory amount.

15. Specifically excluded from the proposed class are those persons who have already secured recovery against Nationwide in connection with the practices complained of, whether by settlement or judgment; and Nationwide's officers, directors, employees, agents, or legal representatives, or the successors or assigns of any of them.

16. ***Numerosity of the Class (Super. Ct. Civ. R. 23(a)(1)).*** The proposed class is so numerous that the individual joinder of all its members is impracticable. Nationwide has been, at all relevant times, among Delaware's most prolific underwriters of PIP coverage; and it remains so today. While the exact number and identities of the proposed class members is presently unknown, and can only be determined through investigation and discovery,

plaintiff is informed and believes that the proposed class includes over ~~200~~ 500 members.

17. ***Existence and Predominance of Common Questions of Law and Fact (Super. Ct. Civ. R. 23(a)(2), 23(b)(3)).*** Common questions of law and fact exist as to all members of the proposed class, and they predominate over any individualized legal or fact questions. These common questions of law and fact include, without limitation, the following:

a. Whether Nationwide has represented to members of the proposed class that they enjoy "full" limits of liability for PIP coverage;

b. Whether Nationwide contends, has contended or will contend that such proposed class members are actually entitled to just the minimum statutory limits of liability for PIP coverage;

c. Whether, under these circumstances, Nationwide's characterization of PIP limits as "full" is ambiguous on its face or as applied;

d. Whether a reasonable purchaser of insurance would expect Nationwide's characterization of PIP limits as "full" to entitle such purchaser to the maximum PIP limits made available by Nationwide in Delaware at the time of the policy's issuance or most recent renewal;

e. Whether a reasonable purchaser of insurance would expect Nationwide's characterization of PIP limits as "full" to entitle such purchaser to coverage of all reasonable and necessary medical expenses

arising from any covered automobile accident, subject to the statutory (two-year) period for PIP coverage under 21 Del. C. §2118(a)(2);

f. Whether Nationwide engages in the practices complained of in paragraphs 9 and 10 above as a matter of regular business practice;

g. Whether Nationwide's conduct is in violation of 6 Del. C. §2513;

h. Whether Nationwide's conduct is in violation of 18 Del. C. §2504;

i. Whether Nationwide has engaged in deliberately deceptive and dishonest conduct;

j. Whether Nationwide has engaged in one or more acts of civil conspiracy;

k. Whether Nationwide has evinced a conscious indifference to the rights of the proposed class members;

l. Whether the proposed class is entitled to compensatory damages, and if so, the amount of such damages;

m. Whether the proposed class is entitled to punitive damages, and if so, the amount of such damages.

18. ***Typicality of Claims (Super. Ct. Civ. R. 23(a)(3)).*** The claims of plaintiffs Thomas A., Roberta L. and Tammy Eames are typical of the claims of other members of the proposed class.

Nationwide expressly represented to these plaintiffs, orally and/or in writing, that the subject automobile insurance policy provided or would provide "full" limits of liability for PIP coverage. As alleged above, however, Nationwide has taken the position that such PIP limits have been exhausted through payment of just the minimum statutory amount.

19. ***Adequacy of Representation (Super. Ct. Civ. R. 23(a)(4)).*** The proposed class representatives are under no actual or potential conflict of interest with respect to other members of the proposed class, and will fairly and adequately protect their interests. They have retained counsel experienced in the prosecution of complex litigation, complex coverage litigation, PIP-related litigation, and PIP-related class action litigation.

20. ***Superiority of Class Action (Super. Ct. Civ. R. 23(b)(3)).*** A class action is superior to other available methods of adjudication for this dispute, because individual joinder of all members of the proposed class is impracticable, and no other method of adjudication of the claims asserted herein is more efficient and manageable. Further, the damages suffered by individual members of the proposed class may be relatively modest, so that the burden and expense of prosecuting individual actions would make it difficult or impossible for such members to obtain relief. The prosecution of such individual actions would also impose a substantial burden on the Delaware courts~~, and on this Court in particular~~. At the same time, individualized litigation would entail

a significant risk of varying, inconsistent or contradictory judgments, and would magnify the delay and expense to all parties and the courts, by requiring multiple trials for the same issues. By contrast, the class action mechanism presents fewer case-management problems; conserves the resources of the parties and the courts; and protects the rights of each member of the proposed class. The proposed class members thus have little interest in individually controlling the prosecution of separate actions; and to counsel's knowledge, there has been no substantial litigation of this dispute in any forum. It is not anticipated that the prosecution of this dispute as a class action will entail any special case-management difficulties; and notice of the pendency of this action, and of any resolution of the same, can be provided to the proposed class by publication and/or individual notice.

21. ***Other Grounds for Certification.*** This action is also certifiable under Superior Court Civil Rules 23(b)(1) and (2) because:

a. The prosecution of separate actions by the individual members of the proposed class would create a risk of inconsistent or varying adjudications with respect to such individual class members, thus establishing incompatible standards of conduct for Nationwide; and

b. Nationwide has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate declaratory relief with respect to the class as a whole.

~~**COUNT I**~~

~~**Declaratory Judgment**~~

~~22. Thomas A., Roberta L. and Tammy Eames, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 21 above.~~

~~23. Nationwide's characterization of minimum PIP limits as "full" is misleading, deceptive and ambiguous, on its face and as applied.~~

~~24. Nationwide's false, misleading and ambiguous characterization of PIP limits entitles the proposed class members and class representatives to a construction of the term "full" (as applied to such PIP limits) that favors such proposed class members and class representatives, and disfavors Nationwide. That construction should be effected by judicial declaration, to the effect that the proposed class members and class representatives are entitled to the maximum PIP limits made available by Nationwide in Delaware at the time the affected insurance contract was issued, or at the time of its most recent renewal (whichever amount is greater); or, alternatively, that such proposed class members and class representatives are entitled to full coverage of all reasonable and necessary medical expenses incurred within the statutory (two year) period for~~

~~PIP claims, and arising from covered automobile accidents.~~

~~25. An actual controversy of a justiciable nature exists between plaintiffs Thomas A., Roberta L. and Tammy Eames, on behalf of themselves and all others similarly situated (on the one hand) and Nationwide (on the other), concerning the parties' rights and obligations under the subject Nationwide insurance contracts. The controversy is of sufficient immediacy to justify the entry of a declaratory judgment.~~

~~26. An award of declaratory relief by this Court will terminate some or all of the existing controversy between the parties.~~

~~COUNT II~~

~~Breach Of Contract~~

~~27. Plaintiffs Thomas A., Roberta L. and Tammy Eames, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 26 above.~~

~~28. Nationwide has breached the subject contracts of insurance by promising to provide or make available, but failing to provide or make available, limits of liability for PIP coverage that are genuinely "full."~~

~~29. As a direct result of Nationwide's breaches of the subject insurance contracts, plaintiffs Thomas~~

~~A., Roberta L. and Tammy Eames and all others similarly situated have been deprived of the benefit of insurance coverage for which premiums were paid under those contracts. As a further result of Nationwide's breaches of contract, plaintiffs Thomas A., Roberta L. and Tammy Eames and all others similarly situated have been deprived of necessary medical care, with resulting pain and suffering and exacerbation of injury.~~

~~COUNT III~~

~~Bad Faith Breach of Contract~~

~~30. Plaintiffs Thomas A., Roberta L. and Tammy Eames, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 29 above.~~

~~31. Nationwide's false and deceptive characterization of PIP limits, as heretofore alleged, has been without reasonable justification.~~

~~32. Nationwide's false and deceptive characterization of PIP limits, as heretofore alleged, has been knowingly dishonest.~~

~~33. Nationwide's false and deceptive characterization of PIP limits, as heretofore alleged, has been in bad faith.~~

~~34. As a direct result of Nationwide's bad faith breaches of the subject insurance contracts, plaintiffs~~

~~Thomas A., Roberta L. and Tammy Eames and all others similarly situated have suffered and will suffer injury as heretofore alleged.~~

COUNT ~~IV~~ I

Consumer Fraud

~~35~~ 22. Plaintiffs Thomas A., Roberta L. and Tammy Eames, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through ~~34~~ 21 above.

~~36~~ 23. Nationwide's conduct, as alleged above, is in violation of 6 Del. C. §2513.

~~37~~ 24. As a direct result of Nationwide's violations of 6 Del. C. §2513, plaintiffs Thomas A., Roberta L. and Tammy Eames and all others similarly situated ~~have suffered and will suffer injury as heretofore alleged.~~ a) have been deprived of the benefit of insurance coverage for which premiums were paid, b) have been deprived of the benefit of their bargain in the sale and purchase of automobile insurance, c) have been deprived of necessary medical care, or confronted with the genuine risk of a loss of necessary medical care, d) have been led to believe that they purchased PIP limits higher than the statutory minimum, or that the statutory minimum limits were the highest PIP limits available for purchase, and e) have been discouraged from purchasing adequate PIP limits or otherwise

prevented from making fully informed decisions regarding their purchase of such limits.

COUNT ~~V~~ II

Civil Conspiracy

~~38~~ 25. Plaintiffs Thomas A., Roberta L. and Tammy Eames, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through ~~37~~ 24 above.

~~39~~ 26. As alleged above, Nationwide has misrepresented the amount of PIP limits available under its Delaware auto policies through the services of its agents in Delaware, including insurance agents.

~~40~~ 27. By purposefully misrepresenting PIP limits through the use of agents, Nationwide has combined with one or more persons in unlawful acts done in furtherance of a conspiracy.

~~41~~ 28. As a direct result of Nationwide's acts of civil conspiracy, plaintiffs and all others similarly situated have suffered and will suffer injury as heretofore alleged.

WHEREFORE, plaintiffs Thomas A. Eames, Roberta L. Eames and Tammy Eames, on behalf of themselves and all others similarly situated, respectfully request that this Court enter judgment as follows:

a. Entering an Order certifying the plaintiff class, appointing plaintiffs Thomas A., Roberta L. and Tammy Eames as representatives of that class, and appointing their counsel to represent the class, all pursuant to Superior Court Civil Rule 23;

~~b. Declaring the parties' rights, duties, status or other legal relations under the disputed insurance contracts;~~

~~c. Awarding to plaintiffs and all others similarly situated compensatory damages, including incidental and consequential damages, for Nationwide's breaches of its insurance contracts;~~

~~d. Awarding to plaintiffs and all others similarly situated punitive damages for Nationwide's bad faith breaches of its insurance contracts;~~

~~e~~ b. Awarding to plaintiffs and all others similarly situated compensatory and punitive damages for Nationwide's violations of 6 Del. C. §2513;

~~f~~ c. Awarding to plaintiffs and all others similarly situated compensatory and punitive damages for Nationwide's acts of civil conspiracy;

~~g~~ d. Awarding to plaintiffs and all others similarly situated all costs of this action; and

~~h~~ e. Awarding such other and further relief as this Court deems just and appropriate.

Respectfully submitted,
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~~August 20, 2004~~
February 10, 2006

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

THOMAS A. EAMES, ROBERTA L. EAMES and TAMMY EAMES, on behalf of themselves and all others similarly situated,	)	C.A. No. 04-CV-1324KAJ
Plaintiffs,	)	TRIAL BY JURY DEMANDED
v.	)	
NATIONWIDE MUTUAL INSURANCE COMPANY,	)	
Defendant.	)	

NOTICE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following:

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February 10, 2006

Supreme Court, U.S.
FILED
FEB 24 2010
OFFICE OF THE CLERK

No. 09-809

IN THE

Supreme Court of the United States

THOMAS A. EAMES, ROBERTA L. EAMES
and TAMMY EAMES,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

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Rule:

Federal Rule of Civil Procedure 9(b) ..... *passim*

In its opposition brief, Nationwide Mutual Insurance Company argues five essential points. First, Nationwide says that review should be denied because the decision below is unpublished, and was designated by the Third Circuit as "not precedential." As shown below, this is irrelevant. *Cf. Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (stating that a Court of Appeals' determination to withhold publication "carries no weight in our decision to review the case.")

Second, Nationwide says that the decision below "announced" no rule of law; though it concedes that the decision indisputably ***applied*** a rule of law (namely, Federal Rule of Civil Procedure 9(b)).

Third, Nationwide argues that though a conflict may exist among the Courts of Appeals with respect to the pleading standards for negligent misrepresentation claims, the Eames plaintiffs pled no such claims % not even in the alternative, and despite having pled claims that are (as Nationwide concedes) provable on a mere showing of negligent misrepresentation. *See Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (confirming that "a negligent misrepresentation is sufficient to violate" the Delaware Consumer Fraud Act).

Fourth, Nationwide claims that the case was dismissed below not just for some perceived failure of pleading, but also on the merits. As demonstrated below, this argument contradicts Nationwide's position before the Third Circuit, where it argued that the Magistrate Judge stayed within the bounds of the district court's referral precisely because he did ***not*** decide the merits.

See 13a (recounting Nationwide's argument that the Magistrate Judge did not "improperly revisit[]" the merits because "the Magistrate Judge's dismissal is framed in the context of Rule 9(b).")

Finally, Nationwide says that the scope of Delaware's analog to Rule 9(b) remains unsettled under Delaware law. This, it suggests, somehow transforms the instant petition into a referendum on state procedural standards. But the decision below applied the federal rule, not any state law analog, to the Eames plaintiffs' pleading; and the issue is whether the (highly unsettled) scope of the federal rule should be finally settled by this Court. The petition thus raises no state law claims.[1]

* * *

The language of Rule 9(b) is plain and straightforward. The cases collected in the petition are not. Because the rule should be applied uniformly throughout the federal courts, this Court should settle the matter.

I.

PUBLICATION *VEL NON* IS IRRELEVANT

Nationwide's lead argument % and as such, the argument that Nationwide apparently regards as its strongest % is that the decision below is unpublished, and was designated by the Third Circuit as "not

[1] The fact that a respected state bench may be struggling with the same procedural issue that has given rise to conflicts among the Courts of Appeals may not be surprising; but it does not alter the purely federal character of the questions presented by this petition.

precedential." Neither circumstance militates against review:

> We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals [erred] regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.

Commissioner of Internal Revenue v. McCoy, 484 U.S. 3, 7 (1987) (granting *certiorari*).

It is likewise recognized that unpublished opinions are no less binding on the parties than published opinions; and that unpublished opinions are not without effect in shaping the law:

> The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.

Smith v. United States, 502 U.S. 1017, 1020 n. (1991) (Blackmun, J., dissenting).

In short, the Third Circuit's (purely) administrative decision to withhold publication is irrelevant to this Court's decision to review.

II.

THE DECISION BELOW SHOULD NOT ESCAPE REVIEW MERELY BECAUSE IT ADOPTED (RATHER THAN RESTATING) THE DISTRICT COURT'S HOLDING

Nationwide says that because the decision below "announced" no rule of law, review should be denied. Yet the Third Circuit clearly referred to the district court's "holding that the pleadings failed to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b)." 2a. It just as clearly affirmed that holding "substantially for the reasons set forth by" the district court. 6a. If (as we contend) the scope of Rule 9(b) is a fit subject for this Court's review, it should not escape review merely because the Third Circuit chose to adopt the district court's holding rather than restating it.

III.

UNDER SETTLED PLEADING STANDARDS, THE EAMES PLAINTIFFS PLED NEGLIGENT MISREPRESENTATION

Nationwide concedes, at least tacitly, that a conflict does exist amongst the Courts of Appeals with respect to the applicability of Rule 9(b) to claims of negligent misrepresentation. Opposition at 1(acknowledging that "certain federal courts do not apply the particularity required by Rule 9(b) to negligent misrepresentation

claims . . . .")[2] Nationwide simply denies that the Eames plaintiffs ever pled negligent misrepresentation.

To prove its point, Nationwide emphasizes selected phrases from the Eames plaintiffs' amended complaint that demonstrate (according to Nationwide) that the Eames plaintiffs failed to plead negligent misrepresentation under the Delaware Consumer Fraud Act ("DCFA"). With a single exception – the allegation that Nationwide's conduct was "purposefully misleading" – all the phrases emphasized by Nationwide (that Nationwide "has misrepresented" facts to consumers, that it has "falsely described" those facts, etc.) are consistent with a DCFA pleading.[3]

---

[2] *Compare Tricontinental Indus., Ltd. v. Pricewaterhouse Coopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007), *cert. denied*, 552 U.S. 824 (2007) (claim for negligent misrepresentation "is ***not*** governed by the heightened pleading standard of Rule 9(b)") (emphasis in original) *and Baltimore County v. CIGNA Healthcare*, No. 06-1877, 2007 WL 1655461, slip op. at *6 (4th Cir. June 5, 2007) (holding that "a claim of negligent misrepresentation under Maryland law does not contain an essential showing of fraud and thus the heightened pleading standard requirements of Rule 9(b) do not apply") *with North American Catholic Educ. Found., Inc. v. Cardinale*, 567 F.3d 8, 15 (1st Cir. 2009) (though "one might think that negligent misrepresentation and fiduciary duty were not on their face subject to Rule 9(b) . . . the case law here and in other circuits reads Rule 9(b) expansively to cover associated claims where the core allegations effectively charge fraud.")

[3] Remarking on the differences between the DCFA and common law fraud % and the simplicity of the former's legal elements % Delaware's Chancery Court has observed:

(Cont'd)

Nationwide does not dispute (nor can it dispute) that a mere negligent misrepresentation is sufficient to support a DCFA claim. *Stephenson*, 462 A.2d at 1074. Nor can it dispute that the amended complaint expressly pled a DCFA count. Its logic must therefore be that when a complaint sets forth all the elements of a particular legal theory, and even contains a dedicated count for that theory, the presence in the complaint of a single "surplus" allegation serves to abandon the legal theory altogether. This proposition is so contrary to modern standards of pleading, and to the liberal construction to which a plaintiff's complaint is traditionally entitled, as to require no answer.

In sum, there is no dispute that the Eames plaintiff's amended complaint alleged all the elements

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(Cont'd)

> To establish a claim under the CFA . . . a plaintiff need only prove:
>
> [t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby.
>
> Thus, the two actions are quite distinct. Scienter, intent to induce action, reliance, and damages are conspicuously missing from the elements of the CFA.

State v. Publishers Clearing House, 787 A.2d 111, 116 (Del. Ch. 2001).

of a DCFA claim, and even labeled them as such. Nor is there any dispute that this claim is provable on a mere showing of negligent misrepresentation. Nationwide's insistence that no claim for negligent misrepresentation is subsumed by the pleadings – the point on which its opposition to the petition ultimately rests – is demonstrably wrong.[4]

IV.

THE CASE WAS DISMISSED ON RULE 9(B) GROUNDS, NOT ON GROUNDS OF STATE SUBSTANTIVE LAW

Nationwide asserts, without citation to the record, that the Magistrate Judge "alternatively ruled on the sufficiency of Petitioners' state law claims." Opp. at 14. In fact, Nationwide understood that if the Magistrate Judge were perceived to have ruled on the merits, he would have exceeded the scope of his referral. Nationwide thus argued successfully to the district court that the entirety of the Magistrate Judge's recommendation was "framed in the context of" Rule 9(b):

---

[4] Equally wrong is Nationwide's assertion that the Eames plaintiffs avoided allegations of negligence to "strengthen" their claim for punitive damages. Under Delaware law, punitive damages for negligence are available only on a showing of outrageous, willful or wanton conduct % hardly an easy showing, and no different substantively from the standard that Nationwide cites in connection with the DCFA. *See Jardel v. Hughes*, 523 A.2d 518, 529 (Del. 1987) (requiring outrageous, willful or wanton conduct for imposition of punitive damages on negligence claims).

> Plaintiffs' primary objection to the Report and Recommendation is that, despite [the predecessor judge's] prior determination that Plaintiffs alleged misrepresentation sufficient to withstand dismissal under Rule 12(b)(6), the Magistrate Judge improperly revisited this subject, even though it was not briefed anew in Nationwide's second Motion to Dismiss. * * *
>
> Nationwide contends that the Magistrate Judge's decision is not inconsistent with prior rulings by [the predecessor judge] in the case, because the Magistrate Judge's dismissal is framed in the context of Rule 9(b).
>
> * * *
>
> Although the Magistrate Judge's Report and Recommendations can be read as holding that Plaintiffs failed to plead a misrepresentation in the first instance, it appears to the Court that the Magistrate Judge's determination that there was no actionable misrepresentation was also made within the context and requirements of Rule 9(b).

13a, 15a.

Nationwide thus prevailed below by arguing that the Magistrate Judge ruled solely within the context of Rule 9(b), and did not improperly tinker with the merits. It now argues before this Court that review should be

denied because the Magistrate Judge affirmatively decided the merits (so that review of procedural issues would constitute an advisory opinion).

In any event, the district court's affirmance of the Magistrate Judge's recommendation sets forth no discussion of the merits whatever, and rests entirely on Rule 9(b) grounds. The case was thus dismissed in the district court, and the dismissal was affirmed in the Third Circuit, because the courts below insisted on applying Rule 9(b)'s particularity requirement to a claim not enumerated within the rule, and which is provable on a showing of negligence. Whether Rule 9(b) so applies is (as shown by the cases collected in the petition) an important an unsettled question, deserving of review.

V.

THE DELAWARE COURTS' CONFLICTING AND UNCERTAIN TREATMENT OF RULE 9(B), WHILE INTERESTING, DOES NOT TRANSFORM THE QUESTIONS PRESENTED INTO MATTERS OF STATE PROCEDURAL LAW

In *State v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001), Delaware's Chancery Court rejected any particularity requirement for DCFA claims based on the statute's origins, legal elements and purpose. *Publishers Clearing House*, 787 A.2d at 114-17. Nationwide says that the Delaware court's analysis should apply only to pleadings filed by the state's Attorney General – despite the DCFA's express creation of a private right of action for consumers, and as though different pleading standards could properly apply based on the pleader's identity.

But this is beside the point. Although the Eames plaintiffs' claims on the merits are state law claims, the case was dismissed (consistent with the familiar *Erie* doctrine) for a perceived failure of pleading under Federal Rule of Civil Procedure 9(b) — not under any state procedural rule. The need for review arises not from matters of state law, but from the lack of uniformity in the federal courts' application of Rule 9(b). *See Sotelo v. DirectRevenue, LLC*, 384 F. Supp.2d 1219, 1233-34 (N.D. Ill. 2005) (holding that the Illinois Consumer Fraud Act, which is substantially identical to the DCFA, "is not subject to the heightened pleading [standard] of Rule 9(b).")

Sotelo thus presents the same problem of which the Eames plaintiffs complained in the petition. Had they been able to file suit in the Northern District of Illinois, their complaint would not have been dismissed. Because it was filed in the District of Delaware, it was dismissed. This (purely procedural) anomaly warrants review.

CONCLUSION

For the reasons stated above, and for the reasons set forth in the Eames plaintiffs' petition, the Eames plaintiffs respectfully request that writ of *certiorari* be allowed.

Respectfully submitted,

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